TRANSCRIPT OF RECORD

(24,392)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 648.

JOPLIN MERCANTILE COMPANY AND JOSEPH FILLER, PETITIONERS,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1914.

Original.

United States Circuit Court of Appeals, Eighth Circuit.

No. 3942.

JOPLIN MERCANTILE COMPANY and JOSEPH FILLER, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

In Error to the District Court of the United States for the Western District of Missouri.

Filed March 20, 1913.

Due and personal service of the within transcript of record in said case, by service of copy thereof, is hereby admitted this 26th day of September, 1914.

FRANCIS M. WILSON,
United States Attorney and Attorney for Respondent.

165,311–10.

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1913, of said Court, before the Honorable William C. Hook and the Honorable Walter I. Smith, Circuit Judges, and the Honorable Charles F. Amidon, District Judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest:

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twentieth day of March, A. D. 1913, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the Western District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Joplin Mercantile Company and Joseph Filler are Plaintiffs in Error and the United States of America is Defendant in Error, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

United States of America,
Southwestern Division,
Western District of Missouri—ss.

In the District Court of the United States for the Southwestern Division of the Western District of Missouri.

United States of America
vs.
Joplin Mercantile Company, Joseph Filler, Martin F. Witte and Ben Deu.

Indictment #197.

United States of America,
Eighth Judicial Circuit.

To the United States of America—Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court to be holden at the City of St. Louis, Missouri, in said circuit, sixty days from and after the day this citation bears date, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States for the Southwestern Division of the Western District of Missouri, wherein the Joplin Mercantile Company and Joseph Filler are plaintiffs in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against said defendants in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Wm. H. Pope, Judge of the District Court of the United States, for the District of New Mexico, sitting as Judge of the District Court of the United States of America in the Southwestern Division of the Western District of Missouri, this 15th day of February, 1913.

WM. H. POPE, Judge.

Due service of the within Citation is admitted this 15 day of February, 1913.

LESLIE J. LYONS,
United States Attorney.

Filed Feb. 15, 1913. John B. Warner, Clerk. By Leila C. Stephenson, D. Clk.

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2 Writ of Error.

United States of America,
Southwestern Division,
Western District of Missouri—ss.

In the District Court of the United States for the Southwestern Division of the Western District of Missouri.
United States of America
vs.
Joplin Mercantile Company, Joseph Filler, Martin F. Witte and Ben Den.

Indictment #197.

United States of America—ss.

The President of the United States of America: To the Honorable Judge of the District Court of the Western District of the State of Missouri, Southwestern Division —Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before you at the January, 1913, term thereof, between the United States of America, plaintiff, and the Joplin Mercantile Company and Joseph Filler, defendants, manifest error hath happened, to the great damage of the said defendants, Joplin Mercantile Company and Joseph Filler, as by their complaint appears.

We being willing that error, if any hath been done, should be fully corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein [give-], that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at
3 the City of St. Louis, Missouri, and filed in the office of the Clerk of the Circuit Court of Appeals, for the Eighth Circuit, on or before the 15th day of April, 1913, to the end that the record and proceedings aforesaid, being inspected, the Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 15th day of February, 1913.

Seal U. S. District Court Southwestern Division Judicial District of Missouri.

Issued at office in Joplin, with the seal of the District Court of the United States for the Western District of Missouri, Southwestern Division thereof.

JOHN B. WARNER,
Clerk of the District Court of the United States of America for the Western District of Missouri, Southwestern Division.
By Leila C. Stephenson, D. C.

Allowed by:

WM. H. POPE,
U. S. District Judge.

Filed Feb. 15, 1913. John B. Warner, Clerk. By Leila C. Stephenson, D. C.

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4 United States Circuit Court of Appeals, Eighth Circuit.

Joplin Mercantile Company and Joseph Filler, Plaintiffs in Error,
No. .... vs
The United States of America, Defendant in Error.

Stipulation to Abbreviate Transcript of Record.

It is hereby stipulated and agreed that in the transcript of record of the print thereof, there shall be omitted from said record by the Clerk all that portion thereof containing the report of the testimony of all of the witnesses, together with the arguments of counsel and the whole of the charge of the Court to the Jury; the record to be made up of the term minutes showing the proceedings had in Court, together with the Demurrer to the Indictment, the Motion to Quash, the Motion for New Trial and the Motion in Arrest of Judgment, together with the rulings of the Court and the exceptions of counsel for the defendant thereto.

PAUL A. EWERT,
Atty. for Plaintiffs in Error.

LESLIE J. LYONS,
United States Attorney.

Endorsed: Filed Feb. 28, 1913. John B. Warner. By Leila C. Stephenson, D. C.

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5 (Presentment of Indictment.)

In the District Court of the United States for the Southwestern Division of the Western District of Missouri.

The United States of America, Plaintiff,
No. 197. vs.
The Joplin Mercantile Company, Joseph Filler, Ben Due and Martin F. Witte, Defendants.

Be It Remembered, That at the June Term, A. D., 1912, of the United States District Court, in and for the Southwestern Division of the Western District of Missouri, begun and held at Joplin, Missouri, in said Division and District, on the second Monday in June, being the tenth day of June, A. D., 1912, the Grand Jury of the United States within and for said Division and District on the 12th day of June, A. D., 1912, came into open Court and presented their True Bill of Indictment against The Joplin Mercantile Company, Joseph Filler, Ben Due and Martin F. Witte, which said Indictment was filed in the above entitled action on said 12th day of June, A. D., 1912, and is in words and figures as follows, to-wit:

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6 Indictment.

United States of America,
Southwestern Division
Western District of Missouri—ss.

In the District Court of the United States for the Southwestern Division of the Western District of Missouri.

The Grand Jurors of the United States of America, duly and legally selected, chosen and drawn from the body of the Southwestern Division of the Western District of Missouri, and duly and legally summoned, impaneled, examined, sworn and charged to inquire of and concerning crimes and offenses against the United States in the Southwestern Division of the Western District of Missouri, upon their oaths present and charge that on or about the 1st day of January, A. D., 1912, at Joplin, Jasper County, Missouri, and at the Southwestern Division of the Western District of Missouri, and within the jurisdiction of this court, the Joplin Mercantile Company, a corporation duly incorporated and existing under and by virtue of the laws

of the State of Missouri, and one Joseph Filler, and one Ben Due and one Martin F. Witte, and other persons to the Grand Jurors unknown, hereinafter called the defendants, then and there being, did then and there unlawfully, wilfully, knowingly and feloniously conspire together to commit an offense against the United States of America, to-wit, to unlawfully, knowingly and feloniously introduce and attempt to introduce malt, spiritous, vinous and other intoxicating liquors into the Indian country, which was formerly the Indian Territory and now is included in a portion of the State of Oklahoma, and into the city of Tulsa, Tulsa County, Oklahoma, which was formerly within and is now a part of what is known
7 as the Indian country, and into other parts and portions of that part of Oklahoma which lies within the Indian country.

And in pursuance of such conspiracy and to effect the object thereof, the said Defendants did on or about the 25th day of April, 1912, at Joplin, Jasper County, Missouri, and within the jurisdiction of this court, deliver and cause to be delivered to the American Express Company, a common carrier of freight and express packages from Joplin, Jasper County, Missouri, to Tulsa, Tulsa County, Oklahoma, and within such Indian country, two certain boxes or packages, in each of which was contained six cases or kegs of spiritous intoxicating liquors, to-wit, whiskey, each of which said cases or kegs contained four and seven-[eight-s] gallons of whiskey, to be shipped and transported from said Joplin, Jasper County, Missouri, by said American Express Company to Tulsa, Tulsa County, Oklahoma, and in the said Indian country.

And further in pursuance of such conspiracy and to effect the object thereof, the said defendants did on or about the 27th day of April, 1912, at Joplin, Jasper County, Missouri, and within the jurisdiction of this court, deliver and cause to be delivered to the American Express Company, a common carrier of freight and express packages from Joplin, Jasper County, Missouri, to Tulsa, Tulsa County, Oklahoma, and within such Indian Country, two certain boxes or packages, in each of which was contained six cases or kegs of spiritous intoxicating liquors, to-wit, whiskey, each of which said cases or kegs contained four and seven-eighths gallons of whiskey, to be shipped and transported from said Joplin, Jasper County, Missouri, by said American Express Company to Tulsa, Tulsa County, Oklahoma, and in the said Indian country.

And further in pursuance of such conspiracy and to effect the object thereof, the said defendant did on or about
8 the 2nd day of May, 1912, at Joplin, Jasper County, Missouri, and within the jurisdiction of this court, de-

liver and cause to be delivered to the American Express Company, a common carrier of freight and express packages from Joplin, Jasper County, Missouri, to Tulsa, Tulsa County, Oklahoma, and within such Indian country, two certain boxes or packages, in each of which was contained six cases or kegs of spiritous intoxicating liquors, to-wit, whiskey, each of which said cases or kegs contained four and seven-[eight-s] gallons of whiskey, to be shipped and transported from said Joplin, Jasper County, Missouri, by said American Express Company to Tulsa, Tulsa County, Oklahoma, and in the said Indian country.

And further in pursuance of such conspiracy and to effect the object thereof, the said defendants did on or about the 5th day of May, 1912, at Joplin, Jasper County, Missouri, and within the jurisdiction of this court, deliver and cause to be delivered to the American Express Company, a common carrier of freight and express packages from Joplin, Jasper County, Missouri, to Tulsa, Tulsa County, Oklahoma, and within such Indian Country, two certain boxes or packages, in each of which was contained six cases or kegs of spiritous intoxicating liquors, to-wit, whiskey, each of which said cases or kegs contained four and seven [eight-s] gallons of whiskey, to be shipped and transported from said Joplin, Jasper County, Missouri, by said American Express Company to Tulsa, Tulsa County, Oklahoma, and in the said Indian Country.

And further in pursuance of such conspiracy and to effect the object thereof, the said defendants did on or about the 7th day of May, 1912, at Joplin, Jasper County, Missouri, and within the jurisdiction of this court, deliver and cause to be delivered to the American Express Company, a common carrier of freight and express packages from Joplin, Jasper County, Missouri, to Tulsa, Tulsa County, Oklahoma, and
9 within such Indian country, two certain boxes or packages, in each of which was contained six cases or kegs of spiritous intoxicating liquors, to-wit, whiskey, each of which said cases or kegs contained four and seven-[eight-s] gallons of whiskey, to be shipped and transported from said Joplin, Jasper County, Missouri, by said American Express Company to Tulsa, Tulsa County, Oklahoma, and in the said Indian Country.

And further in pursuance of such conspiracy and to effect the object thereof, the said defendants did on or about the 8th day of May, 1912, at Joplin, Jasper County, Missouri, and within the jurisdiction of this court, deliver and cause to be delivered to the American Express Company, a common carrier of freight and express packages from Joplin, Jasper Coun-

ty, Missouri, to Tulsa, Tulsa County, Oklahoma, and within such Indian country, two certain boxes or packages, in each of which was contained six cases or kegs of spiritous intoxicating liquors, to-wit, whiskey, each of which said cases or kegs contained four and seven [eight-s] gallons of whiskey, to be shipped and transported from said Joplin, Jasper County, Missouri, by said American Express Company to Tulsa, Tulsa County, Oklahoma, and in the said Indian country.

And further in pursuance of such conspiracy and to effect the object thereof, the said defendants did on or about the 9th day of May, 1912, at Joplin, Jasper County, Missouri, and within the jurisdiction of this court, deliver and cause to be delivered to the American Express Company, a common carrier of freight and express packages from Joplin, Jasper County, Missouri, to Tulsa, Tulsa County, Oklahoma, and within such Indian country, three certain boxes or packages, in which were contained twelve cases or kegs of spiritous intoxicating liquors, to-wit, whiskey, each of which said cases or kegs contained four and seven-[eight-s] gallons of whiskey, to be shipped and transported from said Joplin, Jasper County, Missouri, by said American Express Company to Tulsa, Tulsa County, Oklahoma, and in the said Indian Country, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

THAD B. LANDON,
Assistant United States Attorney.

Endorsed:

United States District Court, Southwestern Division, Western District of Missouri.

The United States
No. 197. vs.
Joplin Mercantile Company, Joseph Filler and Ben Due and Martin F. Witte.

Indictment for Violation Section 37, Penal Code, Conspiracy to violate Sec. 2139, R. S.

A True Bill,

BYRON A. ASH,
Foreman of Grand Jury.

Names of witnesses examined before Grand Jury.

A. T. Bagley,
John Bowman,
Earl C. Sidenor,
John Reiter,
Orel O. Horner,
Cade Long.

Leslie J. Lyons, United States District Attorney.

Filed June 12, 1912. John B. Warner, Clerk.

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11 And afterwards, to-wit, on the 10th day of February A. D., 1913, entry of record appears as follows, to-wit:

Be It Remembered That at an Adjourned January Term of the District Court of the United States, in and for the Southwestern Division of the Western District of Missouri, begun and held at the City of Joplin, Missouri, in said Division and District, on the tenth day of February, A. D., 1913, being the second Monday in February, 1913, there were present,

Honorable William H. Pope, United States District Judge; Leslie J. Lyons, United States District Attorney for the Western District of Missouri; Henry C. Miller, Chief Office Deputy United States Marshal for the Western District of Missouri and John B. Warner, Clerk of the District Court of the United States, in and for the Southwestern Division of the Western District of Missouri.

(Demurrer to Indictment.)

Come now the defendants, Joplin Mercantile Company, Joseph Filler, Martin F. Witte and Ben Due in their
12 own proper person and each of them do demur to the indictment herein, and to each and every count thereof upon the following grounds, to-wit:

First. That the said indictment does not, nor does any count thereof, state facts sufficient to constitute against the said defendants collectively, nor either or any of them, any offense whatever against the laws of the United States.

Second. Upon the ground that the said indictment herein is not signed or endorsed by the foreman of the Grand Jury purporting to have found the same the words, "A True Bill", or any words to that effect.

Third. Upon the ground of duplicity in that the said indictment, if it does state a public offense, does not charge the same with sufficient accuracy and certainty to apprise the defendants, and each of them, of the offense with which he is charged, so that he may properly prepare his defense in the said case.

Wherefore, and for want of sufficient indictment in that behalf, the said defendants, and each of them each for himself,

prays judgment and that by the Court here he may be dismissed and discharged of the said indictment.

PAUL A. EWERT and LUTHER JAMES,
Attorneys for the said Defendants.

Endorsed: Filed February 10, 1913. John B. Warner, Clerk.

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13 Motion to Quash Indictment.

Come now the defendants, Joplin Mercantile Company, Joseph Filler and Martin F. Witte in their own proper persons, and they and each of them do move to quash the indictment herein, upon the following grounds, to-wit:

First. That the said indictment does not state facts sufficient to constitute against the said defendants collectively, or against either or any of them, any offense whatever against the laws of the United States, and does not charge them or either of them with the commission of a public offense.

Second. Upon the grounds of duplicity in that the said indictment, if it does state a public offense, does not charge same with sufficient accuracy and certainty to apprise the defendants, and each of them, of the offense with which they are charged, so that they and each of them, may properly
14 prepare their defense in the said case.

Wherefore, and for want of sufficient indictment in that behalf, the said defendants, and each of them each for himself, prays judgment and that by the Court here he may be dismissed and discharged of the said indictment.

PAUL A. EWERT,
[Attys.] for defendants.

Endorsed: Filed February 10, 1913. John B. Warner, Clerk.

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15 (Ruling on Demurrer and Motion to quash Indictment; Pleas; Jury impaneled, Trial February 10, 1913.)

Before JUDGE POPE.

Indictment under Section 37, Penal Code. Conspiracy to violate Section 2139 R. S.

Now, on this day, comes the United States District Attorney, who prosecutes on behalf of the United States, and, with leave of Court, calls up the Indictment heretofore filed herein.

And now come the Defendants in this cause, Joplin Mercantile Company, Joseph Filler, Ben Due and Martin F. Witte, by their attorneys, Paul A. Ewert and Luther James, and file herein a Demurrer to said Indictment, which said Demurrer is duly argued and submitted to the Court, and after due consideration by the Court, said Demurrer is overruled.

Defendants except to which said rule and order, exceptions allowed by the Court.

And now comes the Defendant, Ben Due, in his own proper person, and by his attorney, Luther James, and being duly arraigned and demanded of as to how he will acquit himself of the charge preferred against him in the aforesaid Indictment, says for plea that he is guilty in manner and form as charged therein.

16

Whereupon Paul A. Ewert withdraws his appearance as attorney for Ben Due, and Luther James, withdraws his appearance as attorney for the other defendants, Joplin Mercantile Company, Joseph Filler and Martin F. Witte.

And now come the Defendants, Joplin Mercantile Company, Joseph Filler and Martin F. Witte, in their own proper persons, and by their attorney, Paul A. Ewert, and, with leave of Court, file a Motion to Quash the Indictment herein; which said Motion to Quash the Indictment herein, after due consideration by the Court, is by the Court overruled and denied.

To which said rule and order defendants, Joplin Mercantile Company, Joseph Filler and Martin F. Witte, duly except.

Exceptions allowed by the Court.

And now come the defendants, Joplin Mercantile Company, Joseph Filler and Martin F. Witte, in their own proper persons, and by their attorney, Paul A. Ewert, and the reading of the Indictment having been waived, they and each of them are duly arraigned, and demanded of as to how they, and each of them, will acquit themselves of the charge preferred against them, and each of them, in the aforesaid Indictment, and they and each of them, say for plea that they and each of them are not guilty in manner and form as charged therein.

Whereupon, both parties announce ready for trial, and a Jury is called to come, to-wit, 1. D. F. Stout, Neosho, Newton County, Missouri, 2. W. P. Finks, Lamar, Barton County, Missouri, 3. Robert Overton, Purdy, Barry County, Missouri, 4. R. H. Rex, Lamar, Barton County, Missouri, 5. E. R. Scott, Hurley, Stone County, Missouri, 6. Bob Cribbett, Lamar, Barton County, Missouri, 7. Charles H. Craig, Galena, Stone Coun-

ty, Missouri, 8. Frank Curless, Liberal, Barton County, Missouri, 9. S. W. Jewell, Golden City, Barton County,
17 Missouri, 10. Joseph Wade, Ponce de Leon, Stone County, Missouri, 11. William Summers, Metz, Vernon County, Missouri, 12. Taylor Hunt, Mt. Vernon, Lawrence County, Missouri, twelve good and lawful men, who are duly impaneled and sworn to well and truly try the issues joined and a true verdict render.

And now the evidence on the part of the plaintiff is heard in part, and the hour of adjournment having arrived, and the trial of said cause not having been completed, it is ordered by the Court that the Jury, after being properly admonished by the Court, as to their duty, are respited until to-morrow at nine-thirty o'clock, to which time the further hearing of this cause is continued.

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18 (Trial, February 11, 1913.)

And now on this day again come the parties hereto, and the Jury heretofore impaneled to try this cause. The Defendants, Joplin Mercantile Company, being present by its attorney and Joseph Filler and Martin F. Witte, being present, each in his own proper person, and by his attorney, Paul A. Ewert, who is also present, and the United States being represented by Leslie J. Lyons, the United States District Attorney for this District, who is also present, the trial of this cause is resumed, and the evidence on the part of the Government is completed, and evidence on the part of the defendants is heard in part, and the time of adjournment having arrived, the Jury is admonished as to its duties, as before, and respited until tomorrow morning at nine-thirty o'clock, to which time the further hearing of this cause is continued.

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19 (Trial, February 12, 1913; Verdicts.)

And now on this day come the parties hereto, the Plaintiff being represented by Leslie J. Lyons, the United States Attorney, and the Defendants, Joplin, Mercantile Company, Joseph Filler and Martin F. Witte, being present in their own proper persons, and by their attorney Paul A. Ewert, also the Jury duly impaneled to try this cause being present, this cause is resumed. And now the evidence of the Defendants being fully completed, both parties rest. Arguments
20 are made by Counsel, and the Jury, after being instructed by the Court as to the law governing them in this cause, retire to consider of their verdict.

And thereafter the Jury advised the Court that they desire further instructions as to the law in this case, and, by direction of the Court are returned into Court, and are further instructed by the Court as to the law, to which instructions defendants and each of them except.

The Jury now returns into Court the following verdicts, to-wit:

"In the District Court of the United States for the Southwestern Division of the Western District of Missouri.

United States of America, Plaintiff,
No. 197. vs.
Joplin Mercantile Company, Martin F. Witte and Joseph Filler, Defendants.

Verdict.

We, the Jury, find the defendant, Martin F. Witte, not guilty as charged in the Indictment herein.

D. F. STOUT, Foreman."

"In the District Court of the United States for the Southwestern Division of the Western District of Missouri.

United States of America, Plaintiff,
No. 197. vs.
Joplin Mercantile Company, Martin F. Witte and Joseph Filler, Defendants.

Verdict.

We, the Jury, find the Defendant, Joplin Mercantile
21 Company, guilty as charged in the Indictment herein.

D. F. STOUT, Foreman."

"In the District Court of the United States for the Southwestern Division of the Western District of Missouri.

United States of America, Plaintiff,
No. 197. vs.
Joplin Mercantile Company, Martin F. Witte and Joseph Filler, Defendants.

Verdict.

We, the Jury, find the Defendant, Joseph Filler, guilty as charged in the Indictment herein.

D. F. STOUT, Foreman."

It is ordered by the Court that the United States Marshal furnish the Jury sitting in this cause, and two Bailiffs, with dinner.

It is further ordered by the Court that the Defendant, Martin F. Witte, be and he is hereby discharged, and his bondsmen exonerated.

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22 (Record Entry of Filing of Motion for New Trial.)

Now, on this day, comes Paul A. Ewert, Esq., Attorney for Defendants, Joplin Mercantile Company and Joseph Filler, and files herein a Motion for New Trial.

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23 Motion for New Trial.

Now come the defendants, Joplin Mercantile Company and Joseph Filler, and move the Court to set aside the judgment rendered in this case and to award to them and each of them a new trial and for grounds of said motion the said defendants say:

First. That the verdict is against the evidence and [and] weight thereof.

Second. That the [vercict] is against the law as applied to the evidence in the case, and against the law as set out in the instructions given by the Court.

Third. That the Court erred in admitting in evidence, over the defendant's objection Exhibits "6-7-8-10-11 and 12", and that the admission is a prejudicial error thereof.

Fourth. That the Court erred in not instructing the jury that in order to find only one of the defendants on trial guilty, it must first find that the said defendant conspired with Ben Due, because there was no evidence adduced at the trial to show that there were persons unknown to the Grand Jury conspiring with the defendants, or either of them.

24 Fifth. Upon the ground of new evidence, to-wit: The evidence of one Fred Ogle of Joplin, Missouri, which will establish the fact and the boxes of express alleged in ..... 6 overt acts charged in the indictment, as having been offered for shipment by defendants from Joplin, Missouri, to Tulsa, Oklahoma, were in fact not so shipped or offered for shipment by the said defendants, but were in fact the property of other persons, and were offered for shipment by said persons, which said statement is supported by the affidavit of the said Fred Ogle, hereto attached, and the defendants, and each of them, state to the Court that if a new

trial is granted herein, the said Fred Ogle will testify to the facts set forth in the said affidavit; that said evidence is new and material to the issue, and not cumulative.

Sixth. That said defendants did not know of the [existance] of said evidence at the time of the trial, and could not, by the use of reasonable diligence, have discovered and produced the same at the former trial.

JOPLIN MERCANTILE COMPANY,
By Joseph Filler.
JOSEPH FILLER,
Defendants.

Paul A. Ewert, Attorney for said Defendants.

Subscribed and sworn to before me this 15th day of February, 1913.

LEILA C. STEPHENSON,
Deputy Clerk U. S. Court.

State of Missouri,
County of Jasper—ss.

Fred Ogle, first being duly sworn on his oath, deposes and says that if defendants are granted a new trial herein he will on said trial testify as follows, that he is now a resident of the city of Joplin, in the State of Missouri; that during all the times mentioned from the 23rd day of April, 1912, until on or about the 8th day of May, 1912, he was in the
25 employ of the American Express Company as express messenger, and during said time his duty as express messenger required him to receive and accept shipments of express tendered to the said American Express Company in the City of Joplin; that between the dates of April 23rd, 1912 and May 8th, 1912, he, on a number of occasions, received telephone messages over the 'phone from the Pioneer Liquor Company, asking him to go to a certain building in the City of Joplin, occupied by the Pioneer Liquor Company, for the purpose of getting certain consignments of express; at other times he received his directions to go to said places from the call book; that in obedience to such calls he went with the wagon of the American Express Company to said place and was directed to go to a house in the alley back of the place of business of the Pioneer Liquor Company, wholesalers of liquor in the City of Joplin, and at said times and in said place there was delivered to the Express Company for shipment, certain large boxes of goods, marked sometimes "household goods" and sometimes as "castings", said boxes being billed or marked to Mrs. L. Martin and others, Tulsa, Oklahoma.

That he received the said boxes from a man known to him as "Ike", whom, on a number of other occasions, he has seen in and about the place of business occupied by the Pioneer Liquor Company of this City; whether he was regularly employed by the said Liquor Company or not, this affiant does not state, but does know that his attentions was directed to these particular boxes, and he inquired what was in them and was told that they contained household goods or castings; He particularly remembers that these boxes were addressed to Mrs. L. Martin, Tulsa, Oklahoma.

Affiant further states that he was present in Court during the testimony [givem] by one Ben Due in the case of United States of America vs. Joplin Mercantile Company et al and heard the said testimony of the said Ben Due, and is of the opinion and believes the boxes referred to in the said testimony of Ben Due were the same boxes which he procured
26 from the building back of the Pioneer Liquor Company's office, referred to in the above and foregoing statement.

Affiant further says that the telephone messages received by him from the Pioneer Liquor Company were to the effect that some one had some express that they wished him to send up for and ship out via American Express.

Affiant does not recall who the person was that telephoned him representing the messages to come from the Pioneer Liquor Company, but went in response to the message and found the said boxes labeled and addressed as indicated, and issued a receipt therefor in behalf of Mrs. L. Martin, or Mrs. L. F. Martin, Tulsa, Oklahoma, as consignor, and were delivered to the above mentioned person known to him as Ike, whose last name is to him unknown, but believed to be O'Conner.

That of his own knowledge he knows that a short time after the shipments above referred to, one of said shipments for some reason or other, came back to the American Express Company in Joplin, and was thereafter claimed and returned to the Pioneer Liquor Company; that said shipment so returned, was to the best of his recollection, one of the shipments billed out to Mrs. L. Martin.

Further affiant sayeth not.

FRED OGLE.

Subscribed and sworn to before me a Notary Public within and for the City of Joplin and State of Missouri, this 14th day of February, 1913.

(L. S.) CLARA SCHUETTE,
Notary Public Jasper County.

My Commission expires January 19, 1915.

Endorsed: Filed Feb. 15, 1913. John B. Warner, Clerk. By Leils C. Stephenson, Deputy Clerk.

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27 (Order overruling Motion for New Trial.)

And which said Motion is opposed by Thad B. Landon, Assistant United States Attorney, for the Plaintiff, and said Motion being submitted, and duly and maturely considered by the Court, it is by the Court,

Ordered, That the several motions herein that said defendants, and each of them, be granted a new trial, be, and each of them hereby is overruled and denied.

And to such order denying said motions an exception is allowed each of said defendants respectively.

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28 Motion in Arrest of Judgment.

Now come the defendant, Joplin Mercantile Company and Joseph Filler, and each for himself separately moves the Court to arrest the judgment on the indictment herein as to each of said defendants, upon which said indictment the said defendants have each been convicted.

This motion so made by each defendant in his own behalf as aforesaid, is based upon the following grounds:

First. That the said indictment upon which this prosecution is based and upon which conviction was had does not state facts sufficient to constitute against the said defendants or either of them, an offense against the laws of the United States, and does not charge them or either of them, with the commission of a public offense.

Second. Upon the ground of duplicity, in that the said indictment if it does allege the commission by these defendants, or either of them, of a public offense, does not charge the same with sufficient accuracy and certainty as to apprise the said
29 defendants, or either of them, of the exact [offence] with which they are respectively charged, so that they, and each of them, may properly prepare their respective defenses in the said case.

Third. Upon the ground that the evidence as adduced at the trial of the said case, is not sufficient to sustain a judgment of conviction or guilty against the said defendants, or either of them; nor does it show that they, or either of them, have committed an offense against the laws of the United States as charged in the [in the] indictment, or any public offense.

PAUL A. EWERT,
Attorney for each of the said Defendants.

Endorsed: Filed Feb. 15, 1913. John B. Warner, Clerk. By Leila C. Stephenson, D. C.

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30 (Judgment and Sentence, etc., February 15, 1913.)

The United States of America, Plaintiff,
No. 197. vs.
Joplin Mercantile Company, Joseph Filler, Ben Due and Martin F. Witte, Defendants.

Indictment under Section 37, Penal Code. Conspiracy to violate Section 2139, R. S.

Now, on this day, the above entitled cause came on [on] to be heard upon a motion herein that judgment be arrested upon the verdicts against the defendants, Joplin Mercantile Company and Joseph Filler, of guilty as charged in the Indictment herein. Paul A. Ewert, Esq., appearing as attorney for said last named defendants, and the plaintiff appearing by Thad B. Landon, Esq., Assistant United States Attorney, and said motion having been argued and submitted and duly and maturely considered by the Court it is by the Court,

Ordered, That said motion be, and the same is hereby overruled and denied and to the order last aforesaid, said last named defendants, by their said Attorney, Paul A. Ewert, Esq., duly except.

And thereupon the Attorney for the Plaintiff moves that judgment be entered against and sentence pronounced upon said defendants, Joplin Mercantile Company and Joseph Filler, and they being inquired of whether they, or either of them, have anything to say why judgment and sentence should not now be entered and pronounced, and nothing being said by their attorney, it is by the Court in accordance with said verdicts,

Ordered, Considered and Adjudged by the Court that the defendants Joplin Mercantile Company and Joseph Filler are

guilty as charged in the Indictment herein, and that as punishment the Joplin Mercantile Company, defendant
31 herein, pay a fine of One Thousand Dollars, ($1000.00), and the costs in this prosecution laid out and expended. And that the defendant, Joseph Filler, be given a term of imprisonment, for a period of one year and one day, from date hereof, in the United States Penitentiary at Leavenworth, Kansas.

It is further considered, ordered and adjudged by the Court that the United States have and recover of and from the said defendant, Joplin Mercantile Company, the sum of One Thousand Dollars, ($1000.00), fine aforesaid, and the costs herein laid out and expended, and it is further ordered and adjudged that the United States recover of and from the defendant, Joseph Filler, a term of imprisonment, for a period of One Year and one day, from date hereof, in the United States [Penitentiary] at Leavenworth, Kansas.

To which judgment and sentence, the defendants, and each of them except.

Which exceptions are duly allowed.

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32 (Record entry of filing of Petition for Writ of Error, Feb'y. 15, 1913.)

Now comes the Joplin Mercantile [Vompany] and Joseph Filler, defendants herein, by their attorney Paul A. Ewert, Esq., and, with leave of Court file herein a Petition for a Writ of Error, by defendants and each of them.

Petition by Defendants, Joplin Mercantile Company and Joseph Filler, and each of them for Writ of Error.

33 Now come the Joplin Mercantile Company and Joseph Filler, defendants herein, and each on his own behalf says that on or about the 15th day of February, 1913, this Court entered judgment herein against said defendants and each of them, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the said defendants and each of them, all of which will more in detail appear on an assignment of errors which is filed with this petition.

Wherefore these defendants, and each of them, pray for the allowance of a Writ of Error in this behalf, from the United States Circuit Court of Appeals for the 8th circuit, for the correction of errors so complained of, and that a transcript of the record proceedings and the papers in the said case duly au-

thenticated may be sent to the Circuit Court of Appeals for the 8th circuit.

PAUL A. EWERT,
Atty. for said defendants and each of them.

Endorsed: Filed February 15, 1913. John B. Warner, Clerk. By Leila C. Stephenson, D. C.

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34 (Record entry of filing of Assignment of Errors, February 15, 1913.)

On this day, the defendants in this action, Joplin Mercantile [—] and Joseph Filler, and each of them in support of their Petition for Writ of Error asked for herein file Assignments of Error, by their Attorney, Paul A. Ewert, Esq.,

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Assignments of Error by Defendants, Joplin Mercantile Company and Joseph Filler.

The defendants in this action, the Joplin Mercantile Company and Joseph Filler, and each of them in support of
35 their petition for the Writ of Error asked for herein, make the following assignments of error, which the said defendants and each of them aver occurred in the proceedings of the District Court in said cause, including the hearing and the decision upon the Demurrer, the hearing and decision upon Motion to Quash, and the proceedings upon the trial of said cause, the hearing and decision upon defendant's Motion for New Trial, and the hearing and decision of the Court upon the Motion in Arrest of Judgment, and in the proceedings had from sentencing the defendants, and each of them.

First. The Court erred in over-ruling the Demurrer of the defendants and each of them, to the said indictment herein.

Second. The Court erred in over-ruling the Motion to Quash the said Indictment herein made by the defendants, and each of them.

Third. The Court erred in over-ruling the motion for a new trial herein made by the defendants, and each of them.

Fourth. The Court erred in over-ruling the Motion in Arrest of Judgment herein, made by the defendants, and each of them.

Fifth. The Court erred in over-ruling the objection made by the defendants, and each of them, to the admission and reception in evidence of [governments'] exhibits—"6-7-8-10-

11 and 12", and alleges that the admitting of the said exhibits in evidence was and is prejudicial error.

PAUL A. EWERT,
Attorney for Defendants, Joplin Mercantile Company and Joseph Filler.

Endorsed: Filed February 15, 1913. John B. Warner, Clerk. By Leila C. Stephenson, D. C.

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36 (Record Entry of Order Allowing Writ of Error, Febr'y. 15, 1913.)

On this day an order of Court allowing Writ of Error to the defendants, Joplin Mercantile Company and Joseph Filler, and each of them, is made herein as follows, to-wit:

Order Allowing Writ of Error to the Defendants Joplin Mercantile Company and Joseph Filler, and each of them.

37 On this 15th day of February, 1913, came the defendants, Joplin Mercantile Company and Joseph Filler, each in person, and each by his Attorney, Paul A. Ewert, filed herein and presented to the Court their petition, made by each of said defendants in his own behalf, praying for the allowance of a Writ of Error; also an assignment of [error-] intended to be urged by the said defendants and each of them, and praying that a transcript of the record proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the 8th circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does allow the Writ of Error upon the defendants' giving bond according to law in the sum of $4000.00, which said bond may be executed by the said defendants as principals, Joseph Filler, president of the Joplin Mercantile Company, signing for said defendant, and of such surety or sureties as shall be approved by the Court, and which shall operate as a supersedeas bond; and a stay of execution is hereby granted, pending the determination of such Writ of Error.

WM. H. POPE, Judge.

Endorsed: Filed February 15, 1913. John B. Warner, Clerk. By Leila C. Stephenson, D. C.

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38 (Record Entry of Filing of Appearance Bond, February 15, 1913.)

On this day comes the defendants, Joplin Mercantile Company and Joseph Filler, by their attorney Paul A. Ewert, and, with leave of Court, file herein an Appearance Bond on Writ of Error, which said Bond is duly approved by the Court.

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39 Appearance Bond on Writ of Error.

Know All Men By These Presents, That we, Joplin Mercantile Company and Joseph Filler, as principals, and United States Fidelity & Guaranty Co., as surety, are held and firmly bound unto the United States of America in the full and just sum of ($4000.00) Four Thousand Dollars to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 15th day of February, in the year of our Lord, one thousand nine hundred and thirteen.

[Whereas] lately at the January term, A. D., 1913, of the District Court of the United States for the District of Missouri, Southwestern Division of the Western District, in a suit pending in said Court between the United States of America, plaintiff, and Joplin Mercantile Company and Joseph Filler, defendants, a judgment and sentence was rendered against the said Joplin Mercantile Company and Joseph
40 Filler, and the said Joplin Mercantile Company and Joseph Filler have obtained a writ of error from the United States District Court for the District of Missouri to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said Joplin Mercantile Company and Joseph Filler shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Eighth [District] on such day or days as may be appointed for the hearing of said cause in said court and prosecute their said writ of error and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Eighth Circuit in said cause, and shall surrender themselves in execution of the judgment

and sentence appealed from as said court may direct, if the judgment and sentence against them shall be affirmed; and if they shall appear for trial in the District Court of the United States for the District of Missouri, Southwestern Division of the Western District, on such day or days as may be appointed for a re-trial by said District Court and abide by and obey all orders made by said court provided the judgment and sentence against them shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit; then the above obligation to be void, otherwise to remain in full force, virtue and effect.

(Seal) JOPLIN MERCANTILE COMPANY,
By Joseph Filler, President of said Joplin Mercantile Company

(Seal) JOSEPH FILLER,

(Seal) UNITED STATES FIDELITY & GUARANTY COMPANY,
(Seal) By F. W. Kelsey and Jesse G:
(Seal Starr, Attorneys in Fact.

41 State of Missouri,
County of Jssper—ss.

On this 15th day of February, 1913, before me appeared Jesse G. Starr and F. W. Kelsey, to me personally known, who being duly sworn, did say that they jointly are the attorneys in fact of the corporation described, and who executed the foregoing instrument and that the said instrument was signed and sealed in behalf of the said corporation by them as attorneys in fact, and they acknowledged the said instrument to be the free act and deed of said corporation.

(L. S.) O. E. MARSHALL,
Notary Public, Jasper County, Missouri.
My commission expires June 27, 1916.

State of Missouri,
County of Jasper—ss.

On this 15th day of February, 1913, personally appeared Joseph Filler, to me known to be the president of the Joplin Mercantile Company, and who executed the foregoing instrument in behalf of the Joplin Mercantile Company, and that the said instrument was signed in behalf of the said corporation by him by authority of [its'] Board of Directors, and the

said Joseph Filler acknowledged the said instrument to be the free act and deed of said corporation.

(L. S.) O. E. MARSHALL,
Notary Public.

My commission expires June 27, 1916.

On this the 15th day of February, 1913, personally appeared before me Joseph Filler, to me known to be the same person who executed the within and foregoing instrument in his own behalf, and he acknowledged that he executed the same
42 as his free and voluntary act and deed.

(L. S.) O. E. MARSHALL,
Notary Public, Jasper County, Missouri.

My commission expires June 27, 1916.

I hereby approve the within bond, both as to form and the sufficiency of the surety.

WM. H. POPE,
U. S. District Judge.

Endorsed: Filed February 15, 1913. John B. Warner, Clerk. By Leila C. Stephenson, D. C.

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43 (Record entry of filing of Writ of Error, February 15, 1913.)

On this day come the Defendants, Joplin Mercantile Company and Joseph Filler, defendants in this action, by their Attorney, Paul A. Ewert, and they and each of them, with leave of Court file herein a Writ of Error.

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44 (Copy of Writ of Error.)

United States of America—ss.

The President of the United States of America: To the Honorable Judge of the District Court of the Western District of the State of Missouri, Southwestern Division—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before you at the January 1913, term thereof, between the United States of America, plaintiff, and the Joplin Mercantile Company and Joseph Filler, defendants, manifest error hath happened, to the great damage of the said defendants, Joplin Mercantile Company and Joseph Filler, as by their complaint appears.

We being willing that error, if any hath been done, should be fully corrected, and full and speedy justice done to the par-

ties aforesaid in this behalf, do command you, if judgment be therein [give-], that then, under your seal, distinctly
45 and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the Circuit Court of Appeals, for the Eighth Circuit on or before the 15th day of April, 1913, to the end that the record and proceedings aforesaid, being inspected, the Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 15th day of February, 1913.

Issued at office in Joplin, with the seal of the District Court of the United States for the Western District of Missouri, Southwestern Division thereof.

(L. S.) JOHN B. WARNER,
Clerk of the District Court of the United States of America for the Western District of Missouri, Southwestern Division.
By Leila C. Stephenson, D. C.

Allowed by WM. H. POPE, U. S. District Judge.

Endorsed: Filed February 15, 1913. John B. Warner, Clerk. By Leila C. Stephenson, D. C.

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46 United States of America,
Southwestern Division of the
Western District of Missouri—ss.

In obedience to the command of the writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the District Court of the United States for the Southwestern Division of the Western District of Missouri.

JOHN B. WARNER,
Clerk of the District Court of the United States within and for the Southwestern Division of the Western District of Missouri.
By Leila C. Stephenson, Deputy Clerk.

47 And thereafter, and on the same day a certain Citation, with admission of service thereon by attorney for Plaintiff, was filed in said Court in said action.

Which said Citation is hereunto annexed and included within the paging hereof.

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48 And afterwards, to-wit, on the third day of March, 1913, in Vacation, there was filed in the office of the Clerk of the District Court of the United States, within and for the Southwestern Division of the Western District of Missouri, an Appearance Bond on Writ of Error, in this cause.

And which said Appearance Bond on Writ of Error, so filed by Joplin Mercantile Company and Joseph Filled, is in words and figures as follows, to-wit:

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49 Appearance Bond on Writ of Error.

Stipulation.

It is hereby stipulated and agreed by and between the plaintiff and the defendant in the above entitled action and their respective attorneys, that the Appeal Bond heretofore filed in the said case made by the United States Fidelity & Guaranty Company, may be withdrawn, and the attached personal bond be submitted therefor.

Dated at Joplin, Missouri, this 28th day of February, 1913.

THAD B. LANDON,
Atty. for U. S. of America.

PAUL A. EWERT,
Atty. for defendants, Joplin Mercantile Company and Joseph Filler.

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50 (Order approving personal Appearance Bond and permitting withdrawal of Bond of U. S. Fidelity and Guaranty Co.)

The within and attached bond hereby is approved as to form and sufficiency of the sureties, and it appearing from the stipulation hereunto attached, signed by the Attorneys for the plaintiff and defendants, that it is desired by all parties that the Appearance Bond heretofore filed herein by the said defendant with the United States Fidelity & Guaranty Company as surety be withdrawn, and the within bond be substituted therefor.

It is hereby ordered that the said bond of the United States Fidelity & Guaranty Company may be withdrawn and the

attached bond substituted therefor as the Appearance Bond in this cause.

Dated at Kansas City, Missouri, this 28th day of February, 1913.

ARBA S. VAN VALKENBURGH,
Judge.

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51 (Appearance Bond, filed March 3, 1913.)

Know All Men By These Presents, That we, the Joplin Mercantile Company and Joseph Filler, as Principals, and Samuel Klein, Joseph Klein, and Sam Arhy, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Four Thousand ($4000.00), Dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 26" day of February, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately, at the January term, A. D. 1913, of the District Court of the United States for the District of
52 Missouri, Southwestern Division of the Western District, in a suit pending in said Court between the United States of America, plaintiff, and Joplin Mercantile Company and Joseph Filler, defendants, a judgment and sentence was rendered against the said Joplin Mercantile Company and Joseph Filler, and the said Joplin Mercantile Company and Joseph Filler have obtained a Writ of Error from the United States District Court for the District of Missouri to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said Joplin Mercantile Company and Joseph Filler shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Eighth [District] on such day or days as may be appointed for the hearing of said cause in said Court and prosecute their said writ of error and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Eighth Circuit in said cause, and shall surrender themselves in execution of the judgment

and sentence appealed from as said Court may direct, if the judgment and sentence against them shall be affirmed; and if they shall appear for trial in the District Court of the United States for the District of Missouri, Southwestern Division of the Western District, on such day or days as may be appointed for a re-trial by said District Court and abide by and obey all orders made by said Court provided the judgment and sentence against them shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit; then the above obligation to be void, otherwise to remain
53 in full force, virtue and effect.

(Seal) JOPLIN MERCANTILE CO,.
By Joseph Filler President of said Joplin Mercantile Company.

(Seal) JOSEPH FILLER,
(Seal) SAMUEL KLEIN,
(Seal) JOSEPH KLEIN,
(Seal) SAM ARKY.

United States of America,
Eastern Division, Eastern
District of Missouri—ss.

On this 26th day of February, 1913, personally appeared Joseph Filler, to me known to be the President of the Joplin Mercantile Company, and who executed the foregoing instrument in behalf of the Joplin Mercantile Company, and acknowledged that the said instrument was signed in behalf of the said corporation by him by authority of its Board of Directors, and the said Joseph Filler acknowledged the said instrument to be the free act and deed of said corporation.

IRVINE MITCHELL,
United States Commissioner at St. Louis, Missouri.

United States of America,
Eastern Division, Eastern
District of Missouri—ss.

On this 26th day of February, 1913, personally appeared before me Joseph Filler, to me known to be the same person who executed the within and foregoing instrument in his own behalf and he acknowledged that he executed the same as his free and voluntary act and deed.

IRVINE MITCHELL,
United States Commissioner at St. Louis, Missouri.

54 United States of America,
Eastern Division, Eastern
District of Missouri—ss.

On this 28th day of February, 1913, personally appeared before me Samuel Klein, Joseph Klein and Sam Arky, to me known to be the same persons who executed the within and foregoing instrument as sureties, and acknowledged that they, and each of them, executed the same as their and his free and voluntary act and deed.

(L. S.) IRVINE MITCHELL,
United States Commissioner at St. Louis, Missouri.

Examination of Applicant to Become Surety on Bond.

Samuel Klein and Joseph Klein of lawful age being duly sworn, upon his oath says that he will true answer make to each and every one of the following questions, touching his, this affiant's qualifications as surety for above named plaintiff, to-wit:

Q. Where do you reside?
A. Samuel at 1410 Kingshighway and Joseph at 3211 Bell Ave, St. Lousi, Mo.
Q. Are you married or single.
A. We are both married.
Q. Where is your real estate located; and what are its dimensions and value?
A. Lots 12, 13, 14, 15, 16, 17, 18 in Block 7; and lots 37, 38, 39, 40, 41 in Block 9; lot 19 in Block 10; Lot 23 in Block 11 in Logan Park Addition to Tolleston, now in Gary, Ind. and lots 12 & 13 in Block 22 in Chicago, Illinois Land and Investment Co's 5th Addition to Tolleston, now in Gary, Ind.
Q. In whose name is the title of the above described
55 [pr-perty]?
A. Title to all foregoing property in our names jointly.
Q. Is there any incumbrance, mortgage or deed of trust upon said property, and what is the amount thereof.
A. None.
Q. Do you live on said property? A. No.
Q. Are there any judgments against you, if so what?
A. None
Q. What is the value of your personal estate? Where is it and of what does it consist?
A. Samuel $3000 in [tailors] cloths; Joseph $5000 in cloth machine & cloths.

Q. What are you worth above all your liabilities?
A. Samuel $8000; Joseph $8000.

SAMUEL KLIEN,
JOSEPH KLIEN.

Sworn and [described] before me this 26′ day of February, A. D., 1913.

(L. S.) IRVINE MITCHELL,
United States Commissioner at St. Louis, Missouri.

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56 Examination of Applicant to Become Surety on Bond.

SAM ARKY of lawful age being duly sworn, upon his oath says that he will a true answer make to each and every one of the following questions, touching his, this affiant's qualifications as surety for above named plaintiff, to-wit:

Q. Where do you reside?
A. 2915 Dayton St. St. Louis, Mo.
Q. Are you married or single? A. Married.
Q. Where is your real estate located, and what are its [dimension-] and value?
A. 2915 Dayton St., St. Louis, Mo. $6000; 2731 Dayton St. St. Louis, Mo., $4000; N. W. corner Anderson & Jefferson Sts. Mexico, Mo. $6500.
Q. In whose name is the title to the above described property?
A. All in mine except 2915 Dayton in mine & wife's joint names.
Q. Is there [aby] incumbrance, mortgage or deed of trust upon said property, and what is the amount thereof?
A. $3000 on 2915 Dayton St. only.
Q. Do you live on said property?
A. Yes on 2915 Dayton St.
Q. Are there any judgments against you, if so what?
A. None.
Q. What are you worth above all your liabilities?
A. $5000.

SAM ARKY.

Sworn to and [described] before me this 26′ day of February, A. D. 1913.

(L. S.) IRVINE MITCHELL,
United States Commissioner, St. Louis, Missouri.

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57 Examination of Surety.

Q. What is your name and where do you reside?
A. Samuel Klein, 1410 Hingshighway.
Q. Are you married or single? A. Yes.
Q. Do you own any real estate and where is it located?
A. 1410 N. Kingshighway and 5242-½ Von Versen Ave.
Q. State the dimensions of the real estate you own, by metes and bounds, front, depth or number of acres.
A. 1410 Kingshighway, 25 feet by 160 feet deep.
5242-44 Von Versen 51′ 6″x170.
58 Q. Is it improved or unimproved?
A. Improved with tenants.
Q. Describe the kind of improvements? A. Flats.
Q. In whose name is the title to the above described property? Is it so recorded? Yes.
A. 1410 Samuel Klein and Tillie Klein, and the 5242-44 on name of Samuel Joseph Tille and Bettie Klein.
Q. At how much is it assessed? What is its market value?
A. $1500.00. 20,000.
Q. Is there any incumbrance, mortgage or deed of trust upon said property, and what is the amount thereof?
A. Yes. On 5242-44 Von Versen $7500. On 1410 N. Kingshighway 3750.
Q. Do you live on said property, and have you a homestead right therein?
A. Yes in the property 1410 N. Kingshighway.
Q. Are there any judgments against you; if so what?
A. No.
Q. Are you now surety upon any bonds; if so, what bonds?
A. No.
Q. What is the value of your personal estate?
A. $3000.00.
Q. Where is it, and of what does it consist?
A. Business at 828 Clarendon and 2400 Coleman.
Q. What are you worth above all your liabilities?
A. Eight thousand five hundred.

SAMUEL KLEIN.

Sworn and subscribed before me this 25 day of Feb'y. 1913.

(L. S.) GUSTA CYTRON,
Notary Public

Endorsed: John B. Warner, Clerk. By Leila C. Stephenson, D. C.

59 (Clerk's Certificate to Transcript.)

I, John B. Warner, Clerk of said District Court, do hereby certify and return to the Honorable United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing, consisting of 59 pages, numbered consecutively from 1 to 59 inclusive, is a true and complete transcript of the Record, Process, Pleadings. Orders, Final Judgment and Sentence and all other proceedings in said cause wherein the United States is plaintiff, and the Joplin Mercantile Company, Joseph Filler, Martin F. Witte and Ben Deu, are defendants, and of the whole thereof, as appears from the original records and files of said Court; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original Writ of Error, and the original citation, together with proof of service thereon.

Seal
U. S. District Court
Southwestern Division
Jud. District of Mo.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at Office in the City of Joplin, in said Division and District, this the 19th day of March A. D., 1913.

JOHN B. WARNER,
Clerk U. S. District Court.
By Leila C. Stephenson, Deputy Clerk.

Filed Mar. 20, 1913. John D. Jordan, Clerk.

(*Appearance of Counsel for Plaintiffs in Error.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 3942.

JOPLIN MERCANTILE COMPANY and JOSEPH FILLER, Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA.

The Clerk will enter my appearance as Counsel for the Plaintiffs in Error.

PAUL A. EWERT,
315 *Miners Bank Bldg., Joplin, Missouri.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 22, 1913.

(*Appearance of Counsel for Defendant in Error.*)

The Clerk will enter my appearance as Counsel for the Defendant in Error.

LESLIE J. LYONS,
U. S. Attorney.
THAD. B. LANDON,
Ass't U. S. Attorney.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 5, 1913.

(*Order of Argument.*)

May Term, 1913.

Thursday, May 22, 1913.

This cause having been temporarily passed by the Court and being now called for hearing, argument was commenced by Mr. Paul A. Ewert for plaintiffs in error and continued by Mr. Thad. B. Landon for defendant in error, and the hour for adjournment having arrived further argument is postponed until tomorrow.

(*Order of Submission.*)

May Term, 1913.

Friday, May 23, 1913.

This cause having been called for further hearing, argument was continued by Mr. Leslie J. Lyons for defendant in error and concluded by Mr. Paul A. Ewert for Plaintiffs in error.

Thereupon, this cause was submitted to the Court on the transcript of record from said District Court and the briefs of counsel filed herein.

(*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1913.

No. 3942.

JOPLIN MERCANTILE COMPANY and JOSEPH FILLER, Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

In Error to the District Court of the United States for the Western District of Missouri.

Mr. Paul A. Ewert for plaintiffs in error.
Mr. Leslie J. Lyons, United States Attorney, and Mr. Thad B. Landon, Assistant United States Attorney, for defendant in error.

Before Hook and Smith, Circuit Judges, and Amidon, District Judge.

SMITH, Circuit Judge, delivered the opinion of the Court.

An indictment was returned for conspiracy under Section 37 of the Penal Code charging that the Joplin Mercantile Company, a corporation existing under and by virtue of the laws of the State of Missouri, and one Joseph Filler, and one Ben Due, and one Martin F. Witte, and other persons to the grand jury unknown, hereinafter called the defendants, then and there being, did then and there unlawfully, wilfully, knowingly and feloniously conspire together to commit an offense against the United States of America, to-wit: to unlawfully, knowingly and feloniously introduce and attempt to introduce malt, spiritous, vinous and other intoxicating liquors into the Indian country which was formerly the Indian Territory and now is included in a portion of the State of Oklahoma, and into the city of Tulsa, Tulsa County, Oklahoma, which was formerly within and is now a part of what is known as the Indian country and into other parts and portions of that part of Oklahoma which lies within the Indian country. Certain overt acts were then alleged all of which charged that the defendants shipped liquors from Joplin, Missouri, to Tulsa, Oklahoma.

Ben Due pleaded guilty. The case against the Joplin Mercantile Company, Joseph Filler and Martin F. Witte was tried to a jury who found the Mercantile Company and Filler guilty and acquitted Martin F. Witte, and the Joplin Mercantile Company was fined and Filler sentenced to the Leavenworth penitentiary and they sued out a writ of error.

The only errors assigned which can be considered by us are:

1. The court erred in overruling the demurrer of the defendants and each of them to the said indictment herein.

2. The court erred in overruling the motion to quash said indictment herein made by the defendants and each of them.

3. The court erred in overruling the motion in arrest of judgment herein made by the defendants and each of them.

Neither the evidence nor the charge of the court *are* before us.

The other questions covered by the assignments are with reference to the motion for a new trial which can not be considered here and the admission of certain evidence which does not appear in the transcript.

The questions, therefore, before this court can be resolved into one. Did the indictment charge an offense?

There are two separate systems of laws on the subject of liquors imported into the territory here in question. The Fifty-Second Congress, on July 23, 1892, 27 Stat. 260, enacted the following as a substitute for Section 2139 of the Revised Statutes:

"SEC. 2139. No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian Superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the Indian country shall be punished by imprisonment for not more than two years, and by a fine of not more than three hundred dollars for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. All complaints for the arrest of any person or persons made for violation of any of the provisions of this act shall be made in the county where the offense shall have been committed, or if committed upon or within any reservation not included in any county, then in any county adjoining such reservation, and, if in the Indian Territory, before the United States court commissioner, or commissioner of the circuit court of the United States residing nearest the place where the offense was committed, who is not for any reason disqualified; but in all cases such arrests shall be made before any United States court commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the state in which such reservation is located to issue warrants for the arrest and examination of offenders by section ten hundred and fourteen of the Revised Statutes of the United States. And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense."

January 30, 1897, it being doubtful whether land allotted to In-

dians remained Indian country under the existing laws, the Fifty-Fourth Congress enacted 29 Stats. 506, in part as follows:

"Any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter."

But almost midway between the enactment of these two statutes the Fifty-Third Congress on March 1, 1895, enacted, 28 Stats. 693, 697:

"SEC. 8. That any person, whether an Indian or otherwise, who shall, in said [Indian] Territory, manufacture, sell, give away, or in any manner, or by any means furnish to anyone, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said Territory any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to anyone, or carrying into said Territory any of such liquors or drinks, shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month nor more than five years."

It will be observed that the first two statutes prohibited introducing liquor into the Indian country but the last prohibited their introduction not into the Indian country but into the Indian Territory which had boundaries fixed by law.

The term Indian country has a constantly changing application but the Indian Territory referred to is a well defined and perpetually existing region.

In United States Express Co. v. Friedman, 191 Fed. 673, this court held that the two first statutes above quoted were still applicable to a considerable portion of the old Indian Territory.

In Ex parte Webb, 225 U. S. 663, the Supreme Court held that the last mentioned act, that of 1895, was still in force as applied to shipments from without Oklahoma.

In this situation this case was brought here in the belief that the decision in Ex parte Webb practically nullified our decision in United States Express Co. v. Friedman, but in United States v. Wright, 229 U. S. 226, the Supreme Court also held, as held by this court in United States v. Friedman, that the acts of 1892 and 1897 remained in force where applicable in Indian Territory and the effect of this holding was that the acts of 1892, 1897 and 1895 all remained in force concurrently in Indian Territory.

If an indictment was returned which charged a defendant with introducing liquor into the Indian country upon the trial a question

of fact would at once arise as to whether the place to which they were imported remained Indian country under the acts of 1892 and 1897 but if the charge was under the act of 1895 the sole question would be whether the liquor had been carried into a geographical location fixed and determined.

It must be borne in mind that this was not an indictment for either of these offenses but was an indictment for a conspiracy to violate both of these laws—introducing liquors into the Indian country which was formerly the Indian Territory. That one conspiracy could be formed to violate any number of laws of the United States seems beyond question. Here the conspiracy was the crime charged and not the introduction of liquors into the Indian country or the carrying of them into the Indian Territory.

It is contended that this conviction could not stand upon the act of 1895 because the indictment failed to charge that the conspiracy was to introduce liquors from without Oklahoma and that the overt acts alleged could not be utilized as the equivalent of such an allegation in the indictment, and reliance is placed upon Ex parte Webb, 225 U. S. 663.

In that case it was claimed the liquors were shipped from Joplin, Missouri, and manifestly it could not involve the question as to whether the act of 1895 was repealed as to importations from parts of Oklahoma not in Indian Territory. It is true that in the Webb case the Supreme Court said:

"We may thus proceed at once to the question of the effect upon the act of 1895 of the Oklahoma Enabling Act of June 16, 1906 (34 Stat. 267, c. 3335), and the admission of the State of Oklahoma into the Union pursuant thereto. Since the Government concedes that the act of 1895 has been thereby repealed saving so far as it prohibited the carrying of intoxicating liquors, etc., from another State into the Territory, the matter to be discussed is still further narrowed."

Again the court said:

"No doubt the Enabling Act, followed by the adoption of the constitution therein prescribed and the admission of the new State, had the effect of remitting to the State government the enforcement of the prohibition respecting the manufacture, sale, barter, etc., of intoxicating liquors within the State, and respecting commerce in such liquors conducted wholly within the State; and, to the extent that the scheme of prohibition established by the Enabling Act covered the same field that had been covered by the act of 1895, the latter act must be considered as impliedly repealed."

If this latter clause stood alone we would be much inclined to think the act of 1895 had been repealed as to carrying liquors from other parts of Oklahoma into Indian Territory, but the question was again before the Supreme Court in United States v. Wright, 229 U. S. 226. In that case the Supreme Court said:

"In the Webb case, as appears from the opinion, p. 676, the Government conceded that the act of 1895 had been repealed by the Enabling Act and the admission of the State thereunder, saving so

far as it prohibited the carrying of intoxicating liquors, etc., from another State into the Territory. The statement to the like effect in the opinion, p. 681, was made in view of this concession; but we see no reason for recalling it."

The latter case like the former was a case of importation into the Indian country but it was a case of importation into the Indian ocuntry from Oklahoma. The indictment was not under the act of 1895 but under the acts of 1892 and 1897.

Schaap v. United States, 210 Fed. 853, involved an indictment for introducing liquor into the Indian country and did not involve the carrying of liquor into Indian Territory. In that case it appears that the liquor was deposited at Ft. Smith, Arkansas, for transportation into the part of Oklahoma that was formerly Indian Territory. It was an attempt at an interstate shipment. We are therefore of the opinion that it did not involve a decision upon the application of the act of 1895 to transactions wholly within the State of Oklahoma. In other words that manifestly it did not involve the question whether the importation of liquors from other points in Oklahoma was illegal. In the opinion in that case the court said:

"General expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. Cohns v. Virginia, 6 Wheat. 264, 393, 5 L. Ed. 257; King v. Pomeroy, 121 Fed. 287, 294, 58 C. C. A. 209, 216; Traer v. Fowler, 144 Fed. 810, 817, 75 C. C. A. 540, 547; Mason City & Ft. Dodge Ry. Co. v. Wolf, 148 Fed. 961, 968, 78 C. C. A. 589, 596."

These are all the cases that touch upon the question as to whether the act of 1895 was repealed as to the balance of Oklahoma. This question is now first presented to this court. We feel that by so specifically pointing out in the Wright case that all that was said upon the subject in the Webb case was based upon the admission of the Government, it was distinctly foreshadowed that it would not be binding upon the court in the future even though it was then said "we see no reason for recalling it."

It seems time that some one discuss the question as the Government has heretofore conceded it without discussing it.

The effect of holding that the Enabling Act for the admission of the State of Oklahoma repealed the law of 1895 as to importations from parts of Oklahoma not in Indian Territory would in effect hold that importations remained prohibited from the north, south, and east of Indian Territory but from the west they were turned over to the State.

The provisions of the Enabling Act requiring the prohibition provisions in the constitution of Oklahoma is of no validity if Oklahoma sees fit to repeal it. She is on an equality with all of the states and can repudiate that and other provisions of the Enabling Act whenever she sees proper. The states are equal in power and a new state when admitted is clothed with all the power of the original states and she can repudiate all the restrictions placed upon her that do not

amount to a contract. Coyle v. Oklahoma, 221 U. S. 559. Why then would the admission of the state repeal the west boundary limit of this law?

In the exercise of its powers to regulate commerce with the Indian tribes Congress has never recognized the boundaries of states as existent. As pointed out in the Friedman case the power to legislate in general with reference to liquor and the Indians is derived from, first, the treaty making power, second, the power to regulate interstate commerce, third, the power to regulate commerce with the Indian tribes, fourth, the ownership, as sovereign, of lands to which the Indian title has not been extinguished, and, fifth, the plenary authority arising out of the guardianship of the Indians as an alien but dependent people.

Prior to the admission of the last of the territories here at home Congress was also vested with the power to legislate on this subject by the provisions of the Constitution that:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

If the Act of 1895 was enacted in the exercise of the second of the powers enumerated in the Friedman case, viz., the power to regulate interstate commerce, then it might well have been that the admission of Oklahoma repealed the statute so far as it applied to the introduction of intoxicating liquors from points of the State of Oklahoma not in Indian Territory. If it was enacted solely in the exercise of the power to enact legislation for the territories then the admission of the state repealed the act in toto but did not repeal it upon the western side and leave it standing upon the north, south and east sides.

Quite a different rule would prevail if it was enacted in the exercise of the third, fourth or fifth powers enumerated in the Friedman case, namely, the power to regulate commerce with the Indian tribes, the power to pass laws by virtue of its ownership as sovereign of land to which the Indian title had not been extinguished and the authority of Congress arising out of its guardianship of the Indians as an alien but dependent people.

The law could not be assigned to the power to enact laws for the government of the territories because there is not an instance in the whole history of the Federal Government's dealing with the territories of a Federal statute regulating the liquor business. That subject has been uniformly left to the territorial authorities and the business has been carried on under such licenses or regulation as those authorized saw fit to impose.

Many considerations indicate that the act was passed as a part of the guardianship of the Indians and as a part of the power of Congress to regulate commerce with the Indians.

1. The federal government was under the most solemn pledges, contained in repeated treaties from the time the Indians were first removed to this district, to protect the Indians in their person and property against the evils of intercourse with people of the white

race. History clearly shows that the greatest of those evils was the sale of intoxicating liquors.

2. Indian Territory contains the largest body of Indian population in the United States. It is not to be presumed that Congress intended to turn these Indians over to the protection of local authorities. This would be contrary to the uniform practice of the federal government in dealing with other Indian tribes in the various states.

3. Section 1 of the Enabling Act expressly reserves full authority to the national government for the protection of the Indians and their property, and thus shows clearly that it was not the intent of Congress in admitting Oklahoma, to remit the Indians to the control of the state. Protection of them against the liquor traffic has always been their greatest need, and it would be contrary to reason to suppose that the reservation in the first section of the Enabling Act was not intended to cover that subject.

4. The numerous statutes passed by Congress at about the time Oklahoma was admitted, to protect these Indians against the evils of intoxicating liquor, show plainly that Congress intended to exercise this protection itself, and not to remit it to the state. It would be strange, indeed, if out of its abundant caution such a conflict has arisen as to wholly defeat this clear purpose of the federal government.

It is true that subdivision 2 of Section 3 of the Enabling Act, containing provisions to be inserted in the constitution of the new state, provided that the legislature might provide for one agency under the supervision of said state in each incorporated town of not less than two thousand population and for one to a county in which there was no town of two thousand inhabitants, for the sale of liquors for medicinal purposes and for the sale of denatured alcohol for industrial and scientific purposes.

This provision probably contemplated the repeal of so much of the act of 1895 as was necessary to enable the proprietors of such dispensaries to obtain intoxicating liquors, but there was no contemplation that if the state authorized such agencies they must obtain their liquors from within the state of Oklahoma. In other words this would be a repeal pro tanto of the act of 1895 upon all sides and not upon the western side. But such proviso or repeal in part of the act of 1895 need not be negatived even in an indictment for carrying liquors into Indian Territory. United States v. Cook, 17 Wall. 168; Ledbetter v. United States, 170 U. S. 606. Still less would it be necessary to negative the proviso in an indictment for conspiracy to carry liquors into Indian Territory.

The same section of the Enabling Act required the state to prohibit for twenty-one years the sale of intoxicating liquors in Indian Territory. This was to secure the co-operation of the state authorities and was not intended to remit to the state the whole subject of the guardianship of the Indians on approach from the west.

The courts have always held that state lines had nothing whatever to do with this subject. This has been in effect held in every case where a conviction has been had for introducing liquors into the Indian country from within the same state but it has been

squarely so held in United States v. Holliday, 3 Wall. 407; United States v. Forty-three Gallons of Whiskey, 93 U. S. 188; United States v. Forty-three Gallons of Whiskey, 108 U. S. 491; Dick v. United States, 208 U. S., 340; United States v. Sutton, 215 U. S. 291; Hallowell v. United States, 221 U. S. 317; United States v. Wright, 229 U. S. 226; United States v. Sandoval, — U. S. —; Sam B. Perrin v. United States, — U. S. —; Joseph Pronovost v. United States, — U. S. —; United States v. Barnhart, 22 Fed. 285.

It thus appears that there was absolutely nothing even after the admission of the state to prevent Congress from prohibiting the importation of liquors into the Indian Territory peopled as it was so largely by Indians and there is therefore no reason to believe that the admission of the state was intended to repeal this law on the western boundary of the Indian Territory.

If the United States had power to prohibit the introduction of liquors illegally from Oklahoma and from other states into Indian Territory upon what basis could it be held that the admission of the state repealed the western boundary of prohibition but left standing the prohibition upon the north, south, and east?

Why were these two systems of laws originally enacted? The general allotment law had been in force some years when the act of 1895 was passed. It was manifest that much of what had heretofore been Indian country would soon cease to be such but Congress wanted to protect the Indians against intoxicating liquors and did not want them admitted to the Territory and therefore prohibited their importation absolutely. Nothing could better illustrate the danger than what has happened. It is now lawful under the acts of 1892 and 1897 to ship liquors across Indian country if the point of destination is not Indian country and Indian Territory may be flooded with liquors under the acts of 1892 and 1897. On the other hand if the act of 1895 was alone in force prohibiting the carrying of liquor within the Indian Territory why would it be unlawful to transport liquor from a point within the Indian Territory to an allotment therein? It was therefore necessary to maintain the provisions of 1892 and 1897 prohibiting the introduction of liquor into the Indian country.

It is claimed that in some way the western boundary of 1895 was taken down and the Government turned over to the State of Oklahoma the guardianship of its wards.

So long as Congress had the right to prohibit the introduction of liquor from Oklahoma into Indian Territory there should be some clearly defined statute to indicate that Congress abandoned its guardianship and turned it over to the state and neither the Government nor the defendants have ever attempted to point out how was thus abdicated the exercise of Congressional powers.

It was not necessary, therefore, for the indictment to allege the conspiracy was to import liquors into the Indian Territory from without Oklahoma.

The conviction may also be sustained upon another ground. The indictment charged a conspiracy to violate the laws of 1892 and 1897 to introduce or attempt to introduce liquors into the Indian

country and into the City of Tulsa, which is now a part of what is known as the Indian country, and to other parts and portions of Oklahoma which lie in the Indian country.

That the laws of 1892 and 1897 are in force in the territory named is beyond question since the decision in United States v. Wright, 229 U. S. 226.

An inspection of the opinion in Schaap v. United States of America will show that this court held that if the place which was charged to be within the Indian country was not so situated that was a matter for proof upon the trial and we have before us none of the evidence and no objection to the indictment could be made upon that ground.

If we should even take judicial notice of the fact that Tulsa was not in the Indian country the indictment charged that the conspiracy was to introduce liquors into other parts or portions of Oklahoma which lie within the Indian country and until we should take judicial notice that no portion of Oklahoma was within the Indian country the objection to the indictment could not be sustained.

The plaintiffs in error suggest the question "Can a corporation be lawfully indicted and convicted for a conspiracy which by statute is declared a felony?"

This question was not especially called to the attention of the District Court by any of the subdivisions of the demurrer, motion to quash, or motion in arrest of judgment but as the counsel for the plaintiffs in error says that this was presented to the court below upon the argument we will briefly consider it although we are not prepared to say that it is pending for consideration here.

"All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors." Penal Code Sec. 335. It follows as the offense of conspiracy may be punished by imprisonment for not more than two years, Penal Code Sec. 37, the offense here charged was a felony. The statute provides, however, that each of the parties to the conspiracy shall be fined not more than ten thousand dollars or imprisoned not more than two years or both. The Mercantile Company in this case was fined.

Owing to the changes from time to time by statute in the meaning of the term "felony" it is perhaps more apt to become misleading than otherwise. The meaning of the term felony is a growth. Originally it meant an offense which occasioned a forfeiture of the lands or goods of the offender as distinguished from a mere money fine. The actual offense here charged was subject to the same punishment before the enactment of the Criminal Code. Revised Statutes 5440 21 Stat. 4. Yet it was not a felony. Bannon v. United States, 156 U. S. 464.

In that case, as if anticipating the action of Congress by nearly fifteen years, the court said:

"And even if it were made a felony by statute, the indictment would not necessarily be defective for failing to aver that the act was feloniously done."

It is manifest that whether a corporation can be convicted of a criminal offense depends not upon technical name, treason, felony, or misdemeanor, attached to the crime but is one of whether the crime is such that the corporation is capable of committing it.

In Bishop's New Criminal Law, Par. 417, upon the sole authority of the author, it is said:

"2. Its Criminal Capabilities Defined.—A corporation cannot in its corporate capacity commit a crime by an act in the fullest sense ultra vires and contrary to its nature. But within the sphere of its corporate capacity, and to an undefined extent beyond, whenever it assumes to act as a corporation it has the same capabilities of criminal intent and of act—in other words, of crime—as an individual man sustaining to the thing the like relations."

As the evidence is not here it cannot be told what was the scope of the authority of this particular corporation but it was doubtless its business to sell liquors.

In Cook on Corporations, 6th Ed. Vol. 1, page 94, it is said:

"Even where it is necessary to prove a fraudulent and malicious intent it is held by the great weight of modern authority that the fraud and malice of the authorized agents of a corporation may be imputed to the corporation itself." See also on the imputability of crime to corporations, Wharton's Criminal Law, 11 Ed., Par. 119.

It has been repeatedly held in civil cases that a corporation may be a party to a conspiracy. Alberthaw Co. v. Cameron, 80 N. E. (Mass.) 478; White v. Apsley Rubber Co., 80 N. E. 500; Buffalo Lubricating Oil Co. v. Standard Oil Co., 106 N. Y. 669, 12 N. E. 825.

In Thompson on Corporations, 2nd Ed., 5440, it is said:

"A corporation is liable for conspiracy to the same extent as are individuals under like circumstances." And see Id. Par. 5632. And in Chicago W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770, it was expressly held that a corporation could be indicted and convicted of a conspiracy at common law.

The plaintiffs in error cite State v. Delmar Jockey Club, 200 Mo. 24, 92 S. W. 185.

That was a civil case and its statement therefore in accordance, however, with the ancient holdings that a corporation could not be guilty of a felony while somewhat persuasive is not controlling with us because the question was not involved in that case.

They also cite Commonwealth v. Proprietors of New Bedford Bridge, 2 Gray 339.

That also was a civil case but held the company liable for nuisance.

These are the only cases cited on the subject by the plaintiffs in error.

Upon the other hand see United States v. Union Supply Co., 215 U. S. 50; Cohen v. United States, 157 Fed. 651, and United States v. MacAndrews Co., 149 Fed. 823.

The whole growth of the modern law tends to subject corporations, as nearly as may be, to the same pains and penalties imposed upon individuals. Of course if the law imposed a death penalty or personal imprisonment a corporation could not be subjected thereto.

Suffice it to say that we think that a corporation could be guilty

of a conspiracy to carry liquor into Indian Territory and to introduce it into the Indian country.

The judgment of the District Court is

Affirmed.

Filed April 3, 1914.

(*Judgment.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1913.

No. 3942.

JOPLIN MERCANTILE COMPANY and JOSEPH FILLER, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA.

In Error to the District Court of the United States for the Western District of Missouri.

Friday, April 3, 1914.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

It is further ordered that the defendants, Joplin Mercantile Company and Joseph Filler, do surrender to the custody of the United States Marshal for the Western District of Missouri, in execution of the judgments and sentence imposed upon them, respectively, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

April 3, 1914.

(*Petition for Stay of Mandate.*)

Your petitioners respectfully show to this Court that, on the 3rd day of April, 1914, an opinion was delivered by this Court in the above entitled matter in all things affirming the judgment of the trial Court; that the plaintiffs in error in said case believe that error was committed by this Court in so affirming the judgment of the trial Court, and in good faith desire to petition the Supreme Court of the United States for a writ of Certiorari in order that a final decision may be had upon the matters of law involved in said case; that your petitioner *is* informed by the Clerk of the Supreme Court of the United States that the Supreme Court of the United States has

adjourned until May 25th, and that no further matters can be submitted to the Court after said date; that the mandate in the above entitled case has not yet been handed down, and it is impossible for petitioner- to prepare and present to the Supreme Court *his* petition for a writ of certiorari on the said 25th day of May, 1914, and therefore asks for a stay of the mandate in the above entitled matter until such time as the petitioner- shall be able to present the said application to the Supreme Court of the United States and until such application shall be received and disposed or by the said Court.

JOPLIN MERCANTILE CO.,
JOSEPH FILLER,
Petitioners.

PAUL A. EWERT,
Attorney for Petitioners.

Certificate of Counsel.

I, Paul A. Ewert, hereby certify that I am the attorney of record for the plaintiffs in error in the above entitled matter, and that the above application is made in good faith and not for the purpose of delay; that counsel has informed plaintiffs in error and verily believes, that there is merit in their petition to the Supreme Court of the United States for a writ of certiorari, and that plaintiffs in error have instructed him to make such an application and that, in good faith the said application will be made in behalf of the plaintiffs in error; that all of the officers of the Joplin Mercantile Company and the plaintiff in error, Joseph Filler, are absent from the district wherein this deponent resides, and therefore this application is signed by him in their behalf.

PAUL A. EWERT.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on May 22, 1914.

(*Order Staying Mandate.*)

May Term, 1914.

Wednesday, May 27, 1914.

This cause came on to be heard upon the motion of Plaintiffs in Error for an order staying the mandate herein.

On Consideration Whereof, it is now here ordered that the mandate in this cause be, and the same is hereby, stayed until and including the 23d day of October, 1914, pending an application to the Supreme Court of the United States for a writ of certiorari to review the decision of this Court in this cause.

May 27, 1914.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States and the petition of plaintiffs in error for a rehearing and the order withdrawing same from consideration which are omitted pursuant to the præcipe of counsel for plaintiffs in error, in a certain cause in said Circuit Court of Appeals wherein the Joplin Mercantile Company and Joseph Filler are Plaintiffs in Error and the United States of America is Defendant in Error, No. 3942, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-fifth day of July, A. D. 1914.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

In the Supreme Court of the United States, October Term, 1914.

No. —.

JOPLIN MERCANTILE COMPANY and JOSEPH FILLER, Petitioners,
vs.
THE UNITED STATES OF AMERICA, Respondent.

Stipulation.

It is hereby stipulated by and between the Joplin Mercantile Company and Joseph Filler, Petitioners in the above entitled matter, and the United States of America, Respondent, that the transcript of the record on file in this case may be taken as a return to the Writ.

PAUL A. EWERT,
Attorney for Petitioners.
JNO. W. DAVIS,
Solicitor General.

(Endorsed:) No. 3942. Joplin Mercantile Company, et al., Plaintiffs in Error, vs. United States of America. Stipulation as to Return to Writ of Certiorari from Supreme Court, U. S. Filed Nov. 7, 1914, John D. Jordan, Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Joplin Mercantile Company and Joseph Filler are plaintiffs in error and The United States of America is defendant in error, No. 3942, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Western District of Missouri, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-seventh day of October, in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of the Joplin Mercantile Company and Joseph Filler, Plaintiffs in Error, vs. United States of America, No. 3942, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificates thereto.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this seventh day of November, A. D. 1914.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

[Endorsed:] File No. 24392. Supreme Court of the United States, October Term, 1914. No. 648. Joplin Mercantile Co. et al. vs. The United States. Writ of Certiorari. Filed Nov. 7, 1914. John D. Jordan, Clerk.

[Endorsed:] File No. 24392. Supreme Court U. S., October Term, 1914. Term No. 648. Joplin Mercantile Company et al., Petitioners, vs. The United States. Writ of certiorari and return. Filed November 9, 1914.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

NO.....

JOPLIN MERCANTILE COMPANY AND JOSEPH FILLER,
PETITIONERS,

VS.

THE UNITED STATES OF AMERICA,
RESPONDENT.

IN THE MATTER OF THE WRIT OF ERROR OF JOPLIN MERCANTILE COMPANY AND JOSEPH FILLER TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FROM THE JUDGMENT OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

MOTION AND PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF.

PAUL A. EWERT,
C. H. MONTGOMERY,
Attorneys for Petitioners,
405-6 Frisco Building, Joplin, Missouri.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

NO.....

JOPLIN MERCANTILE COMPANY AND JOSEPH FILLER,
PETITIONERS,

VS.

THE UNITED STATES OF AMERICA,
RESPONDENT.

MOTION.

IN THE MATTER OF THE WRIT OF ERROR OF JOPLIN MERCANTILE COMPANY AND JOSEPH FILLER TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FROM THE JUDGMENT OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

And now comes Joplin Mercantile Company and Joseph Filler, by Paul A. Ewert and C. H. Montgomery, their attorneys, and move this honorable Court that it will, by writ of certiorari or other proper process directed to the honorable, the judges of the United States Circuit Court of Appeals for the Eighth Circuit, require said Judges and said Court to certify to this Court, for its review and determination,. the record of a certain cause in said Court of Appeals lately pending, wherein the said petitioners, the Joplin Mercantile Company and Joseph Filler, are plaintiffs in error and the said United States of America defendant in error, being cause No. 3942 of said Court of Appeals, to which end your petitioners tender herewith their petition, with reasons for granting the same, together with their brief and a certified copy of the

entire record in said cause in said United States Circuit Court of Appeals, with the admission of service of this motion upon the United States Attorney for the Western District of Missouri, the attorney for the defendant in error in the Court below.

PAUL A. EWERT,
C. H. MONTGOMERY,
Attorneys for said Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

NO.....

JOPLIN MERCANTILE COMPANY AND JOSEPH FILLER, PETITIONERS

VS.

THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the Joplin Mercantile Company and Joseph Filler, petitioners, respectfully shows unto your honors and alleges:

That on the twelfth day of June, 1912, in the District Court of the United States for the Southwestern Division of the Western District of Missouri, an indictment was returned against your petitioners and Martin F. Witte and Ben Due, charging that the said persons did, at Joplin, Missouri, in the Southwestern Division of the Western District of Missouri, on or about the first day of January, 1912,

> "knowingly and feloniously conspire together to commit an offense against the United States of America, to-wit, to unlawfully, knowingly, and feloniously introduce and attempt to introduce malt, spiritous, vineous, and other intoxicating liquors into Indian country, which was formerly the Indian Territory and is now included in a portion of the State of Oklahoma, and into the city of Tulsa, Tulsa County, Oklahoma, which was formerly within and

is now a part of what is known as the Indian country, and into other parts and portions of that part of Oklahoma which lies within the Indian country."

Then follows the allegation of an overt act, alleging that the said Defendants, at Joplin, Missouri, on the twenty-fifth day of April, 1912, did

> "*deliver and cause to be delivered* to the American Express Company * * * two certain boxes or packages, in each of which was contained six cases or kegs of spiritous intoxicating liquors, to-wit, whiskey, * * * *to be shipped* and transported from said Joplin, Jasper County, Missouri, by said American Express Company to Tulsa, Tulsa County, Oklahoma, and in the said Indian country." (Rec. pg. 4 and 5. Italics are ours.)

Then follow allegations of six other overt acts of like nature on different dates in identical language.

Indictment on the first page thereof was endorsed as follows:

> "Indictment for violation of Section 37, Penal Code, conspiracy to violate Section 2139 R. S."

On the tenth day of February, 1913, the several defendants, before pleading to the charge contained in the indictment, duly filed a demurrer, challenging the sufficiency of the indictment upon the following grounds, to-wit:

> "That the indictment does not, nor does any count thereof, state facts sufficient to constitute against the said defendants collectively, nor either or any of them, any offense whatever against the laws of the United States, and
>
> Upon the ground of duplicity in that the said indictment, if it does state a public offense, does not charge the same with sufficient accuracy and certainty to apprise the defendants, and each of them, of the offense with which he is charged, so that he may properly prepare his defense in the said case." (Rec. pg. 8.)

The demurrer was overruled and exceptions allowed, and a motion made to quash the indictment, upon the same grounds named in the demurrer, which was also overruled. (Rec. pg. 9.)

Thereupon Ben Due decided to become a witness for the Government and entered a plea of guilty, and the remaining defendants entered a plea of not guilty.

Thereafter a trial in due form was had for violation of Section 37 of the Penal Code as endorsed on the indictment, the jury

finding the defendants, Joplin Mercantile Company and Joseph Filler, guilty, and the defendant, Martin F. Witte, not guilty.

Thereafter, and before sentence, counsel for the convicted defendants duly made and filed a motion in arrest of judgment, upon the same grounds set forth in the demurrer, and for a new trial, both of which were overruled and denied, and exceptions taken and allowed. (Rec. pg. 16-17.)

The Joplin Mercantile Company was by the Court sentenced to pay a fine of one thousand dollars ($1,000.00) and costs, and Joseph Filler was sentenced to be confined in the United States Penitentiary at Leavenworth for the term of one year and to pay the costs of the prosecution, to which sentence the defendants, and each of them, duly excepted, which exception was allowed.

Thereupon the convicted defendants in due form sued out a Writ of Error, filing therewith their assignments of error, and they were released upon supersedeas bond pending the decision of the Circuit Court of Appeals, Eighth Circuit.

The Petition for the Writ of Error to the Circuit Court of Appeals for the Eighth Circuit was based upon certain assignments of error, alleging that the Court erred

> In overruling the demurrer of the defendants, and each of them, to the indictment,
> In overruling the motion to quash the indictment, and
> In overruling the motion in arrest of judgment.

On May 23, 1913, the cause in due form came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued on that day by counsel an, on Friday, April 3, 1914, the Court affirmed the judgment and sentence of the District Court and directed that the convicted defendants surrender themselves to the United States Marshal for the Western District of Missouri within thirty days after the filing of the mandate. (Rec. Fol. 48.)

Thereafter a petition in due form was filed, asking for a stay of the mandate, and an order made by the Court staying the same until the 23d day of October, 1914, pending this application to the Supreme Court for a Writ of Certiorari to review the decision of this Court in this cause.

The petitioners are advised that the said judgment of affirmance is final and is erroneous, and that this Honorable Court should require the cause to be certified to it for its review and determination under the Act of Congress permitting cases made final in the Circuit Court of Appeals to be certified for such review.

Reasons for the Petition.

To maintain the judgment of affirmance the Court held as follows, to-wit: (Joplin Mercantile Company v. United States. 213 Fed. 926.)

1. That the effect of the Enabling Act of June 16, 1906, (34 Stat. 267, c. 3335) and the admission of the State of Oklahoma into the Union pursuant thereto, was not to repeal the Act of 1895 in so far as it prohibited the introduction of intoxicating liquors from a point within the State of Oklahoma into Indian Territory, and that the indictment did therefore charge a conspiracy to violate the Act of March 1, 1895 (Chap. 145, 28 Stat. 693, 697), which holding is erroneous under the decisions of the Supreme Court of the United States in the case of Ex parte Webb (225 U. S. 666-676), and United States v. Wright (229 U. S. 226.)

2. That the indictment not only charged a conspiracy to introduce intoxicating liquors into the city of Tulsa, alleged to be Indian country, but *into other parts and portions of Oklahoma* which lie in the Indian country; that, if the Court did take judicial notice of the fact that Tulsa was in the Indian country, the indictment was not bad for indefiniteness and uncertainty, and was sufficient to charge a conspiracy to violate the Act of June 23, 1892, (27 Stat. 260) as amended by the Act of June 30, 1897, (29 Stat. 506); which is erroneous under the many decisions of this Court.

3. That the indictment charged both a conspiracy to commit an offense against the Act of 1895 and a conspiracy to commit an offense against the Act of 1897, and yet was not duplicitous, which is erroneous since the decision of this Court in the case of Hyde v. United States (225 U. S. 347), making the overt act a part of the conspiracy.

4. That a corporation can be lawfully indicted and convicted for conspiracy, which by statute is declared a felony, in the face of a decision of the Supreme Court of the State of Missouri, in which the offense was tried, declaring that a corporation cannot have a felonious intent and cannot therefore be prosecuted for felony.

I.

In order to hold that the indictment was sufficient to charge a public offense under the Act of March 1, 1895, it was necessary for the Court to brush aside the admission of the Government, made in the case of Ex parte Webb (225 U. S. 666-676), and in the case of United States v. Wright (229 U. S. 226), that the effect of the Oklahoma Enabling Act of June 16, 1906, (34 Stat. 267, c. 3335), and the admission of the State of Oklahoma into the

Union pursuant thereto, was to repeal the Act of 1895 except so far as it prohibited the carrying of intoxicating liquors from another State into the Territory.

It was forced to override its own decision in the case of Schaap v. United States (210 Fed. 853-856), wherein the Court, Circuit Judge Sanborn, Circuit Judge Carland, and District Judge Riner, speaking through Circuit Judge Sanborn, said:

> "In United States v. Wright, 229 U. S. 226, the Supreme Court, after a studied review and consideration of all the Acts of Congress relevant to the question at issue in this case, *deliberately and doubtless finally* (Italics are ours.) affirmed its decision in Ex parte Webb that the Act of 1895 was repealed so far as it related to the introduction of intoxicating liquors into what was formerly the Indian Territory from places within the State of Oklahoma, but remained in force so far as it related to such introduction of liquors from without the State."

It was forced to hold, and did hold, that the Supreme Court, in the case of Ex parte Webb (Supra), did not speak advisedly when in that case it used the following language:

> "No doubt the Enabling Act, followed by the adoption of the Constitution therein prescribed, and the admission of the new State, had the effect of remitting to the State government the enforcement of the prohibition respecting the manufacture, sale, barter, etc., of such liquors conducted wholly within the State; and, to the extent that the scheme of prohibition established by the Enabling Act covered the same field that had been covered by the Act of 1895, the latter Act must be considered impliedly repealed." (p. 681.)

It was forced to hold, and did hold, that this Supreme Court based its opinion wholly upon the admission of the government to that effect when it reaffirmed its decision in the Webb case by saying, in the case of United States v. Wright (Supra p. 235):

> "In the Webb case, as appears from the opinion, p. 676, the Government conceded that the Act of 1895 had been repealed by the Enabling Act and the admission of the State thereunder, saving so far as it prohibited the carrying of intoxicating liquors, etc., from another State into the Territory. The statement to the like effect in the opinion, p. 681, was made in view of this concession, but we see no reason for recalling it."
>
> "And on the other hand, Congress must be deemed to have intended that the establishment of Statehood should repeal the Act of 1895 with respect to matters wholly in-

> tra-state, because that Act (whatever reasons may have moved Congress to enact it) was, by its terms, applicable to the Territory as a Territory and as a whole, irrespective of whether it was Indian country; and this kind of internal prohibition of the liquor traffic would naturally cease with Statehood, because inconsistent with local self-government and with equality between the States."

If the English language means anything at all, and the expression of ideas through it is not a myth, then the language of the Supreme Court above quoted, used in the Webb case and in the Wright case, means that this Court is of the opinion that the effect of the Enabling Act of June 16, 1906, and the admission of the State of Oklahoma into the Union pursuant thereto, was to repeal the Act of 1895 in so far as it related to the introduction of intoxicating liquors from points within the State of Oklahoma into what was formerly Indian Territory.

The indictment in this case fails to charge that the conspiracy was to introduce intoxicating liquors into Indian Territory *from a point without the State of Oklahoma.* Under the above decisions of this Court, it is not a crime cognizable under the laws of the United States to introduce intoxicating liquors from a point within the State of Oklahoma into Indian Territory. The indictment fails to state that the conspiracy was to introduce intoxicating liquors from a point without the State into Indian Territory, and is therefore insufficient. This Court itself intimates that such an indictment is bad in the language used by it in the Webb case, where the indictment was in substantially the same language, when it says, with reference to that indictment, (p. 674):

> "Whether the offense is sufficiently alleged in the indictment is another question which on familiar ground, is not a proper subject matter for inquiry on habeas corpus."

Evidently the Circuit Court of Appeals was of the opinion that the indictment could not be sustained unless it found that the effect of the Enabling Act was not to repeal the Act of 1895 in so far as it inhibited the introduction of intoxicating liquors from a point within the State into Indian Territory, and it was therefore forced to overrule and it did overrule what to counsel seems a clear holding of this Court in the Webb and Wright cases. In so doing the Circuit Court af Appeals committed error, which this Court should review and correct.

Again, neither counsel for the government, counsel for the defendants, or the trial Court, believed that the indictment was drawn to charge, or was intended to charge, a conspiracy to violate the Act of 1895. The indictment, on the first page thereof, was endorsed, "Indictment for violation of Section 37, Penal

Code, conspiracy to violate Section 2139 Revised Statutes." A careful reading of the indictment (Rec. p. 4 and 5, Fol. 6 and 7) bears out only this construction. The Appellate Court could only reach the conclusion which it did by failing to observe the punctuation found in the conspiracy charge of the indictment. The indictment charges "a conspiracy to introduce intoxicating liquors into the Indian country, which was formerly Indian Territory and is now included in a portion of the State of Oklahoma." It was clearly the intention of the framer of the indictment to charge only a conspiracy to introduce intoxicating liquors into Indian country. The words *which was formerly Indian Territory*, **etc., are pure recital and were clearly intended as descriptive of** the Indian country, so as to define the Indian country, into which the liquor was to be introduced, and set it apart from that vast expanse of country defined as Indian country by the Act of June 30, 1834, (c. 161, 4. Stat. 729). The language of the indictment is the language of the Act of 1897, to-wit, *introduce or attempt to introduce.* It is not the language of the Act of 1895, *to carry into said Territory.*

For this reason, it is alleged such error was committed by the Appellate Court as to warrant this Court in reviewing its action in the premises.

II.

The Circuit Court of Appeals not only held that the indictment was sufficient under the Act of 1895, but that it was also sufficient to charge a conspiracy to introduce intoxicating liquor into the city of Tulsa, which is alleged to be in the Indian country, and into other parts and portions of Oklahoma which lie in the Indian country, in violation of the Act of June 23, 1892, as amended by the Act of June 30, 1897. The Court erred in so doing, because it refused to take judicial notice of the fact that the city of Tulsa is not within the Indian country, thereby overriding the opinion of Judges Adams, Smith and Reed, expressed by them in the case of the United States versus Friedman (191 Fed. 673), wherein the Court expressly held as follows:

> "This Court has the right to take judicial notice not only of the legislation of Congress on this subject, but of all conditions in the Indian Territory which are matters of general and public notoriety."

It then proceeds to take judicial notice of certain legislation of Congress and certain conditions prevalent in Indian Territory which were matters of general and public notoriety.

The exterior limits of the town of Tulsa were established and the town surveyed and platted under the Act of June 28, 1898, c. 517, 30 Stat. 495, No. 14, and the Creek Agreement Act of March

1, 1901, 31 Stat. 861, 866, 867, No. 11, 12, 13, 14 and 23, authorizing the platting appraisal and sale of this land. The records of the Department of the Interior one of the co-ordinate branches of this Government, show that, on February 21, 1901, the Department approved the exterior limits of the town of Tulsa, whereby 654.58 acres were reserved from the allotment and set aside for town-site purposes at Tulsa. The survey was made and the plat approved April 11, 1902. The town-site commission appraised and scheduled the lots, and such schedule and appraisement were approved by the Department June 13, 1902. Patents were issued and at the time of the offense herein alleged, Tulsa was a city of 30,000 people.

The Court should have taken judicial notice of these Acts of Congress and these matters of public notoriety, and it committed error in not so doing.

But, said the Court: (Joplin Mercantile Company v. United States, 213 Fed., p. 926-935.)

> "If we should even take judicial notice of the fact that Tulsa was not in the Indian country, the indictment charged that the conspiracy was to introduce intoxicating liquors into other parts and portions of Oklahoma, which lie within the Indian country, and, until we should take judicial notice that no portion of Oklahoma was within the Indian country, the objection to the indictment could not be sustained."

If the Appellate Court committed error in not taking judicial notice of the Acts of Congress and the Acts of the Department of the Interior, a co-ordinate branch of the Government, then it erred in sustaining the indictment upon the other ground, to-wit, that the indictment also charged a conspiracy to introduce intoxicating liquors *into other parts and portions of Oklahoma* lying within the Indian country. Surely the Court spoke inadvisedly when it stated that the indictment could be sustained upon that ground. Certainly a charge in any indictment that the defendants conspired to introduce and attempt to introduce intoxicating liquors "into parts and portions of that part of Oklahoma which lie within the Indian country" would be so vague and indefinite as to be insufficient, because it does not apprise the defendants with sufficient accuracy and certainty of the offense with which they stand charged so that they may properly prepare their defense. There were more than a hundred thousand allotments made to Indians of the Five Civilized Tribes alone, and the Courts will take judicial notice of the fact that the restrictions on three-fourths of the allotments of mixed-bloods have been removed by direct legislation of Congress, and tens of thousands of acres taken out of the Indian country under laws establishing town-sites. Certainly the defendants would be entitled to know

whether they were charged in the indictment with introducing intoxicating liquors upon restricted or unrestricted allotments, or upon town-sites, such as Muskogee and Tulsa or a hundred other cities and towns in Oklahoma which were removed from the Indian country under the town-site laws, or upon other lands.

In this respect also the Court erred in not sustaining the demurrer to the indictment and the motion in arrest of judgment upon the ground that "the indictment does not charge an offense with sufficient accuracy and certainty to apprise the defendants of the exact nature of the offense with which they stand charged so that they may properly prepare their defenses in the matter," and the action of the Appellate Court for this reason should be reviewed and the error corrected.

III.

The Appellate Court found that the indictment stated two offenses, to-wit, a conspiracy to violate the provisions of the Act of 1895, and a conspiracy to violate the Act of 1897. If the indictment does charge a conspiracy to commit two offenses, then the Court should have sustained the demurrer to the indictment upon the ground of duplicity.

In making this statement counsel does not overlook the fact that the charge is one of conspiracy and not the commission of two substantive offenses. The books are full of authorities holding that an indictment which charges the commission of two distinct offenses in one count is clearly duplicitous.

John Gund Brewing Company v. United States, 204 Fed. 17-21, and authorities there cited.

The distinction between charging a defendant with a conspiracy to commit two different offenses and charging the same defendant with committing the two offenses themselves is purely fiction as far as the rights of the defendant are concerned. It is just as unfair to charge a defendant with a conspiracy to commit two different offenses as it is to charge him with committing the two offenses themselves. No clearer statement could possibly be made as to the rights of the defendants than is made in the opinion of Circuit Judge Sanborn, filed July 8, 1914, but not yet reported, in the case of Ammerman v. the United States. Why is not the reasoning in that case just as applicable in a case charging a conspiracy to violate two different acts, to-wit, the Act of 1895 and the Act of 1897. It would be an offense under the Act of 1897 to conspire to attempt to introduce, while under the Act of 1895 it is not an offense to make such an attempt.

Schaap v. United States, 210 U. S. 853-857.

Why should the one be declared duplicitous and the other not as far as are concerned the constitutional rights of the defendant to know beforehand the specific charge with which he stands indicted so that he may prepare his defense. This is especially true since the ancient rule of conspiracy was modified by this Court by its opinion in the case of Hyde v. United States (225 U. S. 347) making the overt act a part of the conspiracy charge.

The Appelate Court committed such error in the above respects as should be reviewed on certiorari by this Court.

IV.

The Appellate Court sustained the Trial Court in holding that the Joplin Mercantile Company, a corporation, could have a felonious intent and could be lawfully convicted of statutory conspiracy in the face of the decision of the Supreme Court of the State of Missouri, in which State this action was tried, "that a corporation cannot have a felonious intent and cannot therefore be prosecuted for felony."

This is such error as should be reviewed and corrected by this Court.

THE QUESTIONS HEREIN PRESENTED ARE OF GREAT PUBLIC IMPORTANCE AND CONCERN, AND A DECISION FROM THIS COURT IS NECESSARY TO FINALLY SETTLE THE QUESTIONS OF LAW INVOLVED.

Until the decision of the Appellate Court in this case, the trial Courts of Oklahoma, Arkansas, Missouri, and Kansas, and even the Circuit Court of Appeals of the Eighth Circuit with other judges sitting, believed as was said by Judge Sanborn in the Schaap case, Supra, that the Supreme Court "after a studied review and consideration of all the Acts of Congress relevant to the question at issue in this case, *deliberately and doubtless finally* affirmed its decision in Ex parte Webb that the Act of 1895 was repealed so far as it related to the introduction of intoxicating liquors into what was formerly the Indian Territory from places without the State of Oklahoma." But now comes the Appelate Court in this case and, speaking through Circuit Judge Smith, declares that the trial courts have all been wrong in their holdings, and that the Circuit Court of Appeals was wrong in its prior holding, and that the Supreme Court of the United States did not intend to finally decide the question, but based its opinion upon the admission of the Government, and further declares "it seems time that someone discuss the question as the Government has heretofore conceded it without discussing it." If the Supreme Court has not finally decided this question, then it is submitted that it should do so in this case, because the question is one of great public importance and of concern to the courts and prose-

cuting officers, not only in the State of Oklahoma, but in the States contiguous to the State of Oklahoma, wherein, as well as in the Courts of Oklahoma, are pending many cases in which is involved the same question herein sought to be submitted to this Court for its final decision. In a portion of the States the trial judges are adhering to what they believe to be the opinion of the Supreme Court; in other States they are following the opinion of the Appellate Court in this case; and in some States the question has not been passed upon at all, but the trial Courts and the prosecuting officers are in doubt as to the construction of the law.

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid, and ambiguity and uncertainty about the meaning of a criminal statute ought to be resolved by a strict interpretation in favor of the liberty of of the citizen."
>
> (United States v. Brewer, 139 U. S. 278, 288.)

And again, since the decision of the Supreme Court in the Hyde case, modifying the ancient rule of conspiracy and holding that the overt act is a part of the conspriacy, it is of public importance and of concern to the Courts to know whether or not an indictment is duplicitous where it charges a conspiracy to commit several distinct offenses and the conspiracy charge is incomplete unless it be aided by the allegations of the overt acts themselves.

It is further of great public importance and of concern to the Courts to know by a final decision of this Court whether a corporation can be lawfully indicted and convicted for a conspiracy, which by statute is declared a felony, in the face of a decision of the Supreme Court of the State in which the offense is tried, declaring that "a corporation cannot have a felonious intent and cannot therefore be prosecuted for felony."

It is submitted that the record presents questions of great public importance both as to matters of Federal jurisdiction, matters affecting the rights of citizens, and matters relating to procedure in Federal Courts as indicated in this petition and in the brief herewith filed.

WHEREFORE, Your petitioners respectfully pray that a writ of certiorari be issued from and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, State of Missouri, commanding that Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honor-

able Court, as provided by the Act of Congress approved March 3, 1911, known as the Judicial Code, and that the said judgment of the said Circuit Court of Appeals for the Eighth Circuit be reversed by this Honorable Court, and for such other and further relief as to this Honorable Court may seem meet.

And your petitioners will ever pray, etc.

JOPLIN MERCANTILE COMPANY,
JOSEPH FILLER,
Petitioners,

By PAUL A. EWERT,
C. H. MONTGOMERY,
Attorneys for Petitioners.

UNITED STATES OF AMERICA, SOUTHWESTERN DIVISION OF THE WESTERN JUDICIAL DISTRICT OF MISSOURI.

County of Jasper, } ss.
State of Missouri, }

Paul A. Ewert, being duly sworn, on his oath states that he has been the attorney for the petitioners in the above entitled action since the returning of the indictment into the United States District Court, and throughout all the proceedings in said cause in the United States Court of Appeals for the Eighth Circuit up to the present time; that he personally prepared the foregoing petition for writ of certiorari and knows the contents of the same; and that the facts therein stated are true as he verily believes.

PAUL A. EWERT.

Subscribed and sworn to before me this 22nd day of September, 1914.

(SEAL) JOCILE MARET,

Notary Public, Jasper County, Missouri.
My Commission expires July 6, 1918.

I hereby certify that I am counsel for the petitioner in this cause, and that in my judgment the above petition for certiorari is well founded in point of law and fact, and ought to be granted.

PAUL A. EWERT,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

NO.....

JOPLIN MERCANTILE COMPANY AND JOSEPH FILLER,
PETITIONERS

VS.

THE UNITED STATES OF AMERICA,
RESPONDENT.

IN THE MATTER OF THE WRIT OF ERROR OF JOPLIN MERCANTILE COMPANY AND JOSEPH FILLER TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FROM THE JUDGMENT OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

BRIEF OF ARGUMENT FOR PETITIONERS.

STATEMENT OF THE CASE.

The case is so fully stated in the opening statement of the Petition for the Writ of Certiorari that counsel does not believe it is necessary to here re-state the facts. The statement there made is hereby reincorporated in this brief with the same force and effect as if set out in full.

THE INDICTMENT DOES NOT CHARGE FACTS SUFFICIENT TO CONSTITUTE AN OFFENSE AGAINST THE LAWS OF THE UNITED STATES, IS BAD FOR DUPLICITY, AND, IF IT DOES CHARGE A PUBLIC OFFENSE, DOES NOT CHARGE THE SAME WITH SUFFICIENT ACCURACY AND CERTAINTY AS TO APPRISE THE SAID DEFENDANTS, OR EITHER OF THEM, OF THE EXACT OFFENSE SO THAT THEY, AND EACH OF THEM, COULD PROPERLY PREPARE THEIR RESPECTIVE DEFENSE IN THE SAID CASE.

THE INDICTMENT.

United States of America, Southwestern Division Western District of Missouri—ss.

In the District Court of the United States for the Southwestern Division of the Western District of Missouri.

The grand jurors of the United States of America, duly and legally selected, chosen and drawn from the body of the Southwestern Division of the Western District of Missouri, and duly and legally summoned, impaneled, examined, sworn and charged to inquire of and concerning crimes and offenses against the United States in the Southwestern Division of the Western District of Missouri, upon their oaths present and charge that on or about the 1st day of January, A. D. 1912, at Joplin, Jasper County, Missouri, and at the Southwestern Division of the Western District of Missouri, and within the jurisdiction of this Court, the Joplin Mercantile Company, a corporation duly incorporated and existing under and by virtue of the laws of the State of Missouri, and one Joseph Filler, and one Ben Due, and one Martin F. Witte, and other persons to the grand jurors unknown, hereinafter called the defendants, then and there being, did then and there unlawfully, wilfully, knowingly and feloniously conspire together to commit an offense against the United States of America, to-wit, to unlawfully, knowingly and feloniously introduce and attempt to introduce malt, spiritous, vinous and other intoxicating liquors into the Indian country, which was formerly the Indian Territory, and now is included in a portion of the State of Oklahoma, and into the city of Tulsa, Tulsa County, Oklahoma, which was formerly within and is now a part of what is known as the Indian country, and into other parts and portions of that part of Oklahoma which lies within the Indian country.

And in pursuance of such conspiracy, and to effect the object thereof, the said defendants did, on or about the 25th day of April, 1912, at Joplin, Jasper County, Missouri, and within the jurisdiction of this Court, *deliver and cause to be delivered* to the *American Express Company*, a common carrier of freight and express packages from Joplin, Jasper County, Missouri, to Tulsa,

Tulsa County, Oklahoma, and within such Indian country, two certain boxes or packages, in each of which was contained six cases or kegs of spiritous intoxicating liquors, to-wit, whiskey, each of which said cases or kegs contained four and seven-eighths gallons of whiskey, *to be shipped and transported from said Joplin, Jasper County, Missouri,* by said American Express Company *to Tulsa, Tulsa County, Oklahoma,* and in the said Indian country. * * * (Rec. pg. 4-7. Italics are ours.)

The indictment then alleges six other over acts committed within the months of April and May, 1912, charging in identical language *deliveries to the American Express Company for shipment.*

THE DEMURRER TO THE INDICTMENT.

The several defendants demurred to the indictment upon the following grounds, to-wit:

"First. That the said indictment does not, nor does any count thereof, state facts sufficient to constitute against the said defendants collectively, nor either or any of them, any offense whatever against the laws of the United States. * * * *

Third. Upon the ground of duplicity in that the said indictment, if it does state a public offense, does not charge the same with sufficient accuracy and certainty to apprise the defendants, and each of them, of the offense with which he is charged, so that he may properly prepare his defense in the said case. * * * (Rec. pg. 8.)

THE MOTION TO QUASH THE INDICTMENT.

The several defendants moved to quash the indictment upon the following grounds ,to-wit:

"First. That the said indictment does not state facts sufficient to constitute against the said defendants collectively or against either or any of them, any offense whatever against the laws of the United States, and does not charge them or either of them with the commission of a public offense.

Second. Upon the ground of duplicity, in that the said indictment, if it does state a public offense, does not charge same with sufficient accuracy and certainty to apprise the defendants, and each of them, of the offense with which they are charged, so that they, and each of them, may properly prepare their defense in the said case. * * * * (Rec. pg. 9-10.)

MOTION IN ARREST OF JUDMENT.

The motion in arrest of judgment, made after the verdict and before sentence, was based upon the following grounds, to-wit:

"First. That the said indictment upon which this prosecution is based and upon which conviction was had does not state facts sufficient to constitute against the said defendants, or either of them, an offense against the laws of the United States, and does not charge them, or either of them, with the commission of a public offense.

Second. Upon the ground of duplicity, in that the said indictment if it does allege the commission by these defendants, or either of them, of a public offense, does not charge the same with sufficient accuracy and certainty as to apprise the said defendants, or either of them, of the exact offense with which they are respectively charged, so that they, and each of them, may properly prepare their respective defenses in the said case.

Third. Upon the ground that the evidence as adduced at the trial of the said case is not sufficient to sustain a judgment of conviction or guilty against the said defendants, or either of them; nor does it show that they, or either of them, have committed an offense against the laws of the United States as charged in the indictment, or any public offense." (Rec. pg. 16-17.)

ASSIGNMENT OF ERRORS BY DEFENDANTS JOPLIN MERCANTILE COMPANY AND JOSEPH FILLER.

The assignment of errors made in support of the petition for writ of error by the convicted defendants are as follows, to-wit:

"The defendants in this action, the Joplin Mercantile Company and Joseph Filler, and each of them, in support of their petition for the writ of error asked for herein, make the following assignment of errors, which the said defendants, and each of them, aver occurred in the proceedings of the District Court in said cause, including the hearing and the decision upon the demurrer, the hearing and decision upon motion to quash, and the proceedings upon the trial of said cause, the hearing and decision upon defendants' motion for new trial, and the hearing and decision of the Court upon the motion in arrest of judgment, and in the proceedings had in sentencing the defendants, and each of them.

First. The Court erred in overruling the demurrer of the

defendants, and each of them, to the said indictment herein.

Second. The Court erred in overruling the motion to quash the said indictment herein made by the defendants, and each of them.

* * * * *

Fourth. The Court erred in overruling the motion in arrest of judgment herein, made by the defendants, and each of them.

* * * * * (Rec. pg. 19.)

THE STATUTES CONCERNED.

I.

The General Indian Intercourse Acts Concerning Liquor.

R. S., Sec. 2139. No ardent spirits shall be introduced under any pretense, into the Indian country. Every person (except an Indian, in the Indian country),* who sells, exchanges, gives, barters, or disposes of any spiritous liquors or wine to any Indian under the charge of any Indian superintendent or agent, or introduces or attempts to introduce any spiritous liquor or wine into the Indian country, shall be punishable by imprisonment for not more than two years, and by a fine of not more than three hundred dollars. But it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, that the acts charged were done by order of or under authority from the War Department, or any officer duly authorized thereunto by the War Department.

ACT OF JULY 23, 1892 (27 STAT., 260.)*

CHAP. 234. AN ACT To amend Sections twenty-one hundred and thirty-nine, twenty-one hundred and forty, and twenty-one hundred and forty-one of the Revised Statutes touching the sale of intoxicants in the Indian country, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That section twenty-one hundred and thirty-nine of the Revised Statutes be amended and re-enacted so as to read as follows:

"Sec. 2139. No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian Superintendent or agent or introduces

*This clause was in the first edition of the Revised Statutes, but was struck out by the Amendments of 1877—19 Stat., 244.

or attempts to introduce any ardent spirits ale, wine, beer, or intoxicating liquor of any kind into the Indian country shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. All complaints* for the arrest of any person or persons made for violation of any of the provisions of this Act shall be made in the county where the offense shall have been committed, or if commited upon or within any reservation not included in any county, then in any county adjoining such reservation, and, if in the Indian Territory, before the United States Court Commissioner, or Commissioner of the Circuit Court of the United States residing nearest the place where the offense was committed, who is not for any reason disqualified; but in all cases such arrests shall be made before any United States Court Commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the State in which such reservation is located to issue warrants for the arrest and examination of offenders by Section ten hundred and fourteen of the Revised Statutes of the United States. And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the Court of the United States having jurisdiction of the offense."

ACT OF JANUARY 30, 1897 (29 STAT. 506.)*

CHAP. 109. AN ACT to prohibit the sale of intoxicating drinks to Indians, providing penalties therefor, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That any person who shall sell, give away, dispose of, exchange, or barter any malt, spiritous, vinous liquor, including beer, ale, and wine or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound,

*This Act amended Section 2139 (1) by enlarging the description of the liquors so as to include ale, beer, etc., and (2) by adding the passage beginning with the words "All complaints," which we have italicized in the text, and which define venue, etc., especially in the Indian Territory.

*This Act (1) further enlarged the definition of the liquors, (2) enlarged the denition of the Indians, especially so as to cover allottees in trust, and all under guardianship (3) changed the punishment, and (4) did not repeat the venue provisions added by the Act of 1902, although leaving them still standing by limiting the repeal of that Act to the provisions which were "inconsistent." (Sec. 2).

composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spiritous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: Provided, however, That the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country, that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department.

Sec. 2. That so much of the Act of the twenty-third of July, 1892, as is inconsistent with the provisions of this Act is hereby repealed.

II.

*Indian Territory Act of March 1, 1895, (28 Stat. 693).**

Chap. 145. An Act to provide for the appointment of additional judges of the United States Court in the Indian Territory, and for other purposes.

Section 1 (divides the Indian Territory "now within the jurisdiction of the United States Court in said Territory" into three judicial districts).

Section 2 (provides for "two additional judges of the United States Court in said Indian Territory," and for an attorney, marshal, and deputy marshals).

Section 3 (provides for clerks and deputies).

Section 4 (provides for commissioners and extends certain

*The prior history of this line of legislation is given in the footnote to the Act of March 1, 1889, in I Supplement to the Revised Statutes, Vol. I, second edition, p. 670.

portions of the Arkansas Criminal Law and Procedure to the Indian Territory. This section also provides for appeals).

Section 5 (provides for constables).

Section 6 (provides for jurors).

Section 7 (provides for venue).

Sec. 8. That any person, whether an Indian or otherwise, who shall, in said Territory, manufacture, sell, give away, or in any manner, or by any means furnish to any one, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said Territory, any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to any one, or carrying into said Territory any of such liquors or drinks, shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month nor more than five years. (28 Stat., 697.)

Section 9 (provides as to the exclusive jurisdiction of the United States Court in the Indian Territory and repeals the jurisdiction theretofore had by the United States Courts in Arkansas, Kansas, and Texas over offenses committed in the Indian Territory).

Section 10 (provides for court rooms in the custody of prisons).

Section 11 (provides for a court of appeals made up of the several district judges).

Section 12 (provides for fees to officials).

Section 13. That none of the provisions of any other acts, or of any of the laws of the United States, or of the State of Arkansas, heretofore put in force in said Indian Territory, except so far as they come in conflict with the provisions of this Act, are intended to be repealed, or in any manner affected by this Act, but all such acts and laws are to remain in full force and effect in said Territory.

III.

Act of February 28, 1902 (32 Stat. L., 43).

CHAP. 134. AN ACT TO grant the right of way through the

Oklahoma Territory and the Indian Territory to the Enid & Anadarko Railroad Company, and for other purposes. Be it enacted * * *

Section 7. That the officers, servants, and employees of said company necessary to the construction and management of said road shall be allowed to reside, while so engaged, upon such right of way, but subject to the provisions of the Indian intercourse laws, and such rules and regulations as may be established by the Secretary of the Interior in accordance with said intercourse laws.

IV.

The Oklahoma Enabling Act of June 16, 1906, (34 Stat., 267).
The Oklahoma Enabling Act of June 16, 1906, (34 Stat., 267).

CHAP. 3335. AN ACT TO enable the people of Oklahoma and of the Indian Territory to form a constitution and State government and be admitted into the Union on an equal footing with the original States; and to enable the people of New Mexico and Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original States.

Section 2 (provides for a constitutional convention and the qualifications of voting for delegates, etc).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed.

Section 3. That the delegates to the convention thus elected shall meet at the seat of government of said Oklahoma Territory on the second Tuesday after their election, excluding the day of election in case such day shall be Tuesday, but they shall not receive compensation for more than sixty days of service, and, after organization, shall declare, on behalf of the people of said proposed State, that they adopt the Constitution of the United States; whereupon the said convention shall, and is hereby authorized to, form a constitution and State government for said proposed State. The constitution shall be republican in form and

make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said convention shall provide in said constitution—

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship, and that polygamous or plural marriages are forever prohibited.

Second. That the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said State now known as the Indian Territory and the Osage Indian Reservation and within any other parts of said State which existed as Indian reservations on the first day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of said State into the Union, and thereafter until the people of said State shall otherwise provide by amendment of said constitution and proper State legislation. Any person, individual or corporate, who shall manufacture, sell, barter, give away, or otherwise furnish any intoxicating liquor of any kind, including beer, ale, and wine, contrary to the provisions of this section, or who shall, within the above-described portions of said State, advertise for sale or solicit the purchase of any such liquors, or who shall ship or in any way convey such liquors from other parts of said State into the portions hereinbefore described, shall be punished, on conviction thereof, by fine not less than fifty dollars and by imprisonment not less than thirty days for each offense: Provided, That the Legislature may provide by law for one agency under the supervision of said State in each incorporated town of not less than two thousand population in the portions of said State hereinbefore described; and if there be no incorporated town of two thousand population in any county in said portions of said State, such county shall be entitled to have one such agency, for the sale of such liquors for medicinal purposes; and for the sale, for industrial purposes, of alcohol which have been denaturized by some process approved by the United States Commissioner of Internal Revenue; and for the sale of alcohol for scientific purposes to such scientific institutions, universities, and colleges as are authorized to procure the same free of tax under the laws of the United States; and for the sale of such liquors to any apothecary who shall have executed an approved bond, in a sum not less than one thousand dollars, conditioned that none of such liquors shall be used or disposed of for any purpose other than in the compounding of prescriptions or other medicines, the sale of which would not subject him to the payment of the special tax required of liquor dealers by the United States, and the payment of such special tax by any person within the parts of said State hereinbefore defined shall constitute prima facie evidence of his intention to violate the provisions of this section. No sale shall

be made except upon the sworn statement of the applicant in writing setting forth the purpose for which the liquor is to be used, and no sale shall be made for medicinal purposes except sales to apothecaries as hereinbefore provided unless such statement shall be accompanied by a bona fide prescription signed by a regular practicing physician, which prescription shall not be filled more than once. Each sale shall be duly registered, and the register thereof, together with the affidavits and prescriptions pertaining thereto, shall be open to inspection by any officer or citizen of said State at all times during business hours. Any person who shall knowingly make a false affidavit for the purpose aforesaid shall be deemed guilty of perjury. Any physician who shall prescribe any such liquor, except for treatment of disease which, after his own personal diagnosis, he shall deem to require such treatment, shall, upon conviction thereof, be punished for each offense by fine of not less than two hundred dollars or by imprisonment for not less than thirty days, or by both such fine and imprisonment; and any person connected with any such agency who shall be convicted of making any sale or other disposition of liquor contrary to these provisions shall be punished by imprisonment for not less than one year and one day. Upon the admission of said State into the Union these provisions shall be immediately enforceable in the courts of said State.

Third. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian tribe or nation; and that until the title to any such public land shall have been extinguished by the United States the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. The land belonging to citizens of the United States residing without the limits of said State shall never be taxed at a higher rate than the land belonging to residents thereof; that no taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use.

Section 21 (after providing for the election of State officers and that Osage Reservation should be a separate county, etc., proceeds:) * * * And all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, except as modified or changed by this Act or by the Constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States.

Section 22. That the constitutional convention provided for

*The act then proceeds with the provisions for Arizona and New Mexico. It contains no repealer.

herein shall, by ordinance irrevocable, accept the terms and conditions of this Act.*

V.

Schedule of Punishments Imposed By the Various Acts.

	Fine.		Imprisonment.	
	Maximum.	Minimum.	Maximum.	Minimum.
R. S. 2139	.....	$300	.....	2 years.
Act of 1892	.....	$300	.....	2 years.
Act of 1897	$100 (first offense).. $200 (later)	.....	60 days	.....
Ind. Ter. Act 1895	.....	$500	1 month	5 years.
Oklahoma Enabling Act, 1906.	$50	.....	30 days	.....

*Committed until paid.

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THE COURT ERRED IN READING INTO THE INDICTMENT A CHARGE OF CONSPIRACY TO COMMIT AN OFFENSE AGAINST THE PROVISIONS OF THE ACT OF 1895.

Beyond the peradventure of a doubt the framer of the indictment intended to charge a conspiracy for violation of the provisions of the Act of 1897. The indictment was endorsed on the first page thereof as follows:

> "Indictment for violation of Sec. 37 Penal Code, conspiracy to violate Sec. 2139, R. S." (Rec. p. 7, Fol. 10.)

The indictment charges a conspiracy "to introduce and attempt to introduce * * * intoxicating liquors into the Indian country, which was formerly the Indian Territory and now is included in a portion of the State of Oklahoma." (Rec. p. 5, Fol. 7.) From this language, and this language only, the Appellate Court found that the indictment charged a conspiracy to violate the provisions of the Act of 1895, and it could only have done so by relying upon the punctuation of the indictment set forth in the brief of counsel for the Government. It must have overlooked the comma (,) after the words "Indian country." The words "which

was formerly Indian Territory and now is included in a portion of the State of Oklahoma," are purely recital and were clearly intended by the framer of the indictment to be descriptive of the Indian country into which it was conspired to introduce and attempt to introduce intoxicating liquors. It was necessary to do this in order to establish the confines of the Indian country into which it was attempted to introduce the intoxicating liquors. In the case of

Evans v. Victor, 204 Fed. 361,

the Court said (syllabus):

> "The criterion to determine what is Indian country is that all the country which was declared to be Indian country by the Act of June 30, 1834, c. 161, 4 Stat. 729, remains Indian country as long as the Indians retain their original title, and in the absence of a different provision by treaty or Act of Congress ceases to be Indian country whenever that title is extinguished."

The framer of the indictment drew the conspiracy section in the exact language of the statute, to-wit, the Act of January 30, 1897, not the Act of 1895, which makes it an offense for any person to "*introduce or attempt to introduce* * * * intoxicating liquor of any kind whatsoever into the Indian country." In order to set apart the Indian country into which it was conspired to introduce the intoxicating liquors so as to set it apart from the vast expense of territory west of the Mississippi River made Indian country by the Act of June 30, 1834, the words "Indian country" in the indictment were limited and qualified and explained by adding the words, and setting them off by commas (,), "which was formerly Indian Territory and is now included in a portion of the State of Oklahoma." That was the general charge made in the indictment as to what was intended by the words "Indian country."

If there were no Act of 1897 and no law against the introduction of liquor into the Indian country, would any Court hold that this indictment charged a conspiracy to introduce liquor into the Indian country in violation of the Act of 1895? If the English language means anything at all, as counsel interprets it, this indictment charges nothing but a conspiracy to introduce liquor into the Indian ~~Territory~~ Country in violation of the Act of 1897.

IF A CHARGE OF VIOLATING THE ACT OF 1895 CAN BE READ INTO THE INDICTMENT, IT IS STILL BAD, BECAUSE IT FAILS TO ALLEGE THAT THE CONSPIRACY WAS TO INTRODUCE THE INTOXICATING LIQUOR INTO INDIAN TERRITORY FROM A POINT WITHOUT THE STATE OF OKLAHOMA.

In the case of

Ex parte Webb, 225 Fed. 681,

the Court, in construing the effect of the Oklahoma Enabling Act upon the Act of 1895, declared:

> "No doubt the Enabling Act, followed by the adoption of the constitution therein prescribed and the admission of the new State, had the effect of remitting to the State government the enforcement of the prohibition respecting the manufacture, sale, barter, etc., of intoxicating liquors within the State; and, to the extent that the scheme of prohibition established by the Enabling Act covered the same field that had been covered by the Act of 1895, the latter Act must be considered as impliedly repealed."

In the case of

United States v. Wright, 229 U. S. 226-236-237,

the Court refused to qualify the statement therein made by amplifying its decision in the following language:

"In the Webb Case, as appears from the opinion, p. 676, the Government conceded that the Act of 1895 had been repealed by the Enabling Act and the admission of the State thereunder, saving so far as it prohibited the carrying of intoxicating liquors, etc., from another State into the Territory. The statement to the like effect in the opinion, p. 681, was made in view of this concession; but we see no reason for recalling it. The language used was: "No doubt the Enabling Act, followed by the adoption of the constitution therein prescribed and the admission of the new State, had the effect of remitting to the State government the enforcement of the prohibition respecting the manufacture, sale, barter, etc., of intoxicating liquors within the State; and, to the extent that the scheme of prohibition established by the Enabling Act covered the same field that had been covered by the Act of 1895, the latter Act must be considered as impliedly repealed." But this had reference only to the Act of 1895, and not to the Act of 1897, it having previously been stated in the opinion (p. 676) that since 2139, Rev. Stat., and the Act of 1897 contained provisions respecting the sale of intoxicating liquors to Indians, and in this and perhaps in other important respects covered ground not covered by the Act of 1895, we must not be understood as deciding that those prohibitions were no longer in force within what was the Indian Territory.

But, because the Act of 1895 was impliedly repealed with respect to intra-state manufacture and traffic, it does not necessarily follow that the Act of 1892, as amended in 1897, was likewise repealed in respect of that traffic, by the Enabling Act and

the admission of the State. The one was a territorial prohibition applicable to the Indian Territory because made so by Congress, irrespective of other considerations; while the other Act, applicable to Indian country throughout the States and Territories generally, happened to be applicable to the Indian Territory because that was Indian country. But as already pointed out, in passing the Enabling Act, Congress knew that if, and when, and so far as, portions of the Indian Territory ceased to be Indian country, the Acts of 1892 and 1897 would cease to apply, irrespective of Statehood; *and on the other hand, must be deemed to have intended that the establishment of Statehood would repeal the Act of 1895 with respect to matters wholly intra-state, because the Act (whatever reasons may have moved Congress to enact it) was, by its terms, applicable to the Territory and as a whole, irrespective of whether it was Indian country; and this kind of internal prohibition of the liquor traffic would naturally cease with Statehood because inconsistent with local self-government and with equality between the States.*" (Italics are ours.)

The Circuit Court of Appeals for the Eighth Circuit itself, in the case of

Schaap v. United States, 210 Fed. 853-856,

believed that the statement contained in the Wright case (Supra), was the last word of the Supreme Court and final and conclusive upon that point. Circuit Judge Sanborn, in speaking for the Court sitting in that case, used the following language (p. 856):

> "But in the United States v. Wright, 229 U. S. 226, 232, 236, 238, 33 Sup. Ct. 630, 57 L. Ed. 1160, the Supreme Court, after a studied review and consideration of all the Acts of Congress relevant to the question at issue in this case, deliberately and doubtless finally affirmed its decision in Ex parte Webb that the Act of 1895 was repealed so far as it related to the introduction of intoxicating liquors into what was formerly the Indian Territory from places within the State of Oklahoma, but remained in force so far as it related to such introduction of liquors from without the State."

Notwithstanding these authoritative declarations, Circuit Judge Smith, speaking for the Court in the case at bar, to-wit,

> Joplin Mercantile Company v. United States, 213 Fed. 926,

declared that the prior reasoning and holding of the Supreme Court in the Webb Case and in the Wright case, and of its own Court in the Schaap case, was based entirely upon the admission of the Government in both of those cases, and unhesitatingly said (p. 931):

> "It seems time that some one discuss the question as the Government has heretofore conceded it without discussing it."

It then does discuss it and finds that both the reasoning and the decision of the Supreme Court, and of its own Court with other judges sitting, cannot stand, and so the learned Court, by an ingenious and able process of reasoning, overrules them both and declares the law to be that the effect of the Enabling Act upon the Act of 1895 was not to repeal it in any respect, and that it stands with the same force and effect today as it did before the Enabling Act was passed and Oklahoma admitted into the Sisterhood of the States thereunder.

If the opinion of the Appellate Court in this case is to stand and the opinion of the Supreme Court in the Webb case and in the Wright case and the opinion of Judge Sanborn, speaking for the Court in the Schaap case, is to fall, then the indictment must stand if the Court finds that the language of the indictment was intended to charge and does charge a conspiracy to violate the provisions of the Act of 1895.

If, on the other hand, this Honorable Court sustains its own opinion in the Webb case and in the Wright case, the indictment must fall because it fails to allege, in the conspiracy section of the indictment, that it was conspired to introduce the intoxicating liquors into Indian Territory *from a point without the State of Oklahoma.* It is not a far guess to say that this Honorable Court indirectly expressed an opinion upon that point in the Webb case when it used the following language (p. 674):

> "It is not open to serious dispute that if the prohibition of the Act of 1895 against 'carrying into said Territory any such liquors or drinks' remains operative, so far as pertains to the carrying of intoxicating liquors from another State into that part of Oklahoma which was the Indian Territory, the acts admittedly done by the petitioners constitute an offense thereunder, of which the United States District Court has jurisdiction. *Whether the offense is sufficiently alleged in the indictment is another question, which, on familiar grounds, is not a proper subject-matter for inquiry on habeas corpus.*"

The language of the indictment in the case at bar and in the Webb case is similar. The indictment in the Webb case charges:

> "That Otis Tittle and Charley Webb, and each of them, on the 23rd day of January, in the year 1912, in the said division of said district and within the jurisdiction of said Court in Craig County, in the State of Oklahoma, the same then and there being and constituting a portion of the In-

dian country of the said United States, did at the time and place aforesaid, unlawfully, knowingly, wilfully and feloniously introduce, and attempt to so introduce and carry into the said Indian country, from without the said Indian country, seventeen gallons of spiritous, ardent, and intoxicating liquor, to-wit, alcohol, which said alcohol was by the said Otis Tittle and Charley Webb, and each of them, so introduced and carried into that portion of said Eastern District of Oklahoma so being then and there Indian country, as above set forth and described, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

In the case at bar it is charged:

"That on or about the 1st day of January, A. D. 1912, at Joplin, Jasper County, Missouri, and at the Southwestern Division of the Western District of Missouri, and within the jurisdiction of this Court, the Joplin Mercantile Company, a corportaion duly incorporated and existing under and by virtue of the laws of the State of Missouri, and one Joseph Filler, and one Ben Dun, and one Martin F. Witte and other persons to the grand jurors unknown, hereinafter called the defendants, then and there being, did then and there unlawfully, wilfully, knowingly and feloniously conspire together to commit an offense against the United States of America, to-wit, unlawfully, knowingly and feloniously introduce and attempt to introduce malt, spiritous, vinous and other intoxicating liquors into the Indian country, which was formerly the Indian Territory and now is included in a portion of the State of Oklahoma, and into the City of Tulsa, Tulsa County, Oklahoma, which was formerly within and is now a part of what is known as the Indian country, and into other parts and portions of that part of Oklahoma which lies within the Indian country.

And in pursuance of such conspiracy and to effect the object thereof, the said defendants did on or about the 25th day of April, 1912, at Joplin, Jasper County, Missouri, and within the jurisdiction of this Court, deliver and cause to be delivered to the American Express Company, a common carrier of freight and express packages from Joplin, Jasper County, Missouri, to Tulsa, Tulsa County, Oklahoma, and within such Indian country, two certain boxes or packages, in each of which was contained six cases or kegs of spiritous, intoxicating liquors, to-wit, whiskey, each of which said cases or kegs contained four and seven-eighths gallons of whiskey, to be shipped and transported from said Joplin, Jasper County, Missouri, by said American Express Company to Tulsa, Tulsa County, Oklahoma, and in the said Indian country."

The offense of introducing intoxicating liquors in violation of the 1895 Act, or into what was the Indian Territory, from without the State of Oklahoma, is statutory. And while the general rule is that an indictment which charges a statutory crime in the language of a statute is sufficient when the statute fully, directly and with certainty sets forth all the elements of the crime,

Rupert v. United States, 181 Fed. 87;
Ledbetter v. United States, 170 U. S. 606.

yet it is equally well established that an indictment in the words of a statute is insufficient, where the statute does not fully, directly and with certainty set forth all the elements necessary to constitute the offense.

Morris v. United States, 161 Fed. 672;
Marlin v. United States, 172 U. S. 434.

and, furthermore, the material elements of an offense, whether statutory or otherwise, must always be stated clearly and explicitly and not left to intendment or reached by way of inference or argument.

Kovoloff v. United States, 202 Fed. 475.

Now the 1895 Act, at the time of its passage, may be said to have stated fully, directly and with certainty all the elements of the crime designated by it, namely, the introduction of intoxicating liquors into the Indian Territory from any place outside of the same. But since the Act is held by the Supreme Court to have been impliedly repealed in so far as it relates to the introduction of intoxicating liquor into what was the old Indian Territory from that part of the State of Oklahoma which was formerly the Oklahoma Territory, it must be conceded that the Act does not fully, directly and with certainty set forth all of the elements of the crime left standing, namely, an introduction of intoxicating liquors into the Indian Territory side of the State of Oklahoma **from outside** said State. Hence, the indictment herein is not sufficient under the authorities above cited to charge an offense under the Act as impliedly repealed.

In the case at bar the indictment does not even charge the conspiracy in the language of the statute. The language used is the language of the Act of 1897 and not the Act of 1895. As was said by Circuit Judge Sanborn in the Schaap case (Supra, p. 857), there is no prohibition in the Act of 1895 of an *attempt to introduce or carry* intoxicating liquors into Indian Territory. The indictment in the Wright case (Supra) is in the following language:

"United States of America, Eastern District of Oklahoma.

In the District Court of the United States in and for the Eastern District of Oklahoma, at the April term thereof, A. D. 1912, at Tulsa.

The grand jurors of the United States of America, duly impaneled, sworn and charged at the term aforesaid, of the Court aforesaid, to inquire into and due presentment make of offenses against the said United States, on their oath do find, present and charge, that one Bob Wright, whose name is to the grand jurors otherwise unknown, on the 19th day of March, in the year 1912, in the County of Muskogee, in the said district, and within the jurisdiction of said court, the said county and district then and there being a portion of the Indian country of the United States, did at the time and place aforesaid unlawfully, wilfully, knowingly and feloniously introduce into said Indian country one quart of malt, vinous, spiritous, distilled, ardent and intoxicating liquor, to-wit: Whiskey. Contrary, etc.,"

and District Judge Campbell, in sustaining the demurrer interposed by the defendants to the indictment, used language which is so clear and so logical that we quote it in full:

"To this indictment the defendant has demurred on the ground that the same does not charge him with an offense against the laws of the United States. It will be noted that the charge is not that the defendant introduced the liquor in question into the said Indian country from a point without the State of Oklahoma; the charge is that the defendant introduced the whiskey into the said Indian country, but there is nothing to indicate the point from which the liquor was introduced by the defendant. The court must take judicial cognizance of the fact that a large portion of the State of Oklahoma is not now Indian country, so that it follows that the charge would apply either to the introduction of liquor from a point without the State of Oklahoma or the introduction of liquor from a point within the State of Oklahoma, but outside of that portion of the State still remaining Indian country. The offense charged is statutory.

'An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear the pleader must either charge the offense in the language of the act, or specifically set forth the facts constituting the same. The general rule is that the charge must be so laid in the indictment as to bring the case precisely within the description of the offense as given in the statute, alleging distinctly all the essential requisites that constitute it. Such facts must be alleged

that if proven defendant cannot be innocent. Either the letter or the substance of the statute must be followed, and nothing is to be left to implication or intendment or to conclusion. The want of direct averments of material facts cannot be supplied by argument or inference, nor by the conclusion, "Contrary to the form of the statute.'" 22 Cyc. 335.

The demurrer, therefore, raises the question whether it is an offense cognizable in the Federal Court to introduce liquor from a point within the State of Oklahoma, but outside of that portion now Indian country, into such Indian country; or whether, on the other hand, the only cases of introduction of liquor into the portion of Oklahoma remaining Indian country, of which the Federal Court has jurisdiction, are those in which the liquor is introduced from a point without the State into the said Indian country. This must be determined by the statute defining the offense, and from which this court acquires jurisdiction.

In Ex parte Webb (225 U. S. 663) it was decided that Sec. 8 of the Act of March 1, 1895, (28 Stat. 693), as amended by the Oklahoma Enabling Act (34 Stat. 267), is still in force in that portion of the State of Oklahoma formerly comprising Indian Territory. * * *

An examination of the indictment in that case develops that the introduction of the liquor was charged as from without the Indian country into the Indian country, it not appearing whether it was from a point without or within the State. But, as suggested by the Court, the defendant having admitted in the agreed statement of facts upon which that case was presented that the liquor was introduced from a point outside the State, the matter of the charge in the indictment became immaterial so far as the inquiry upon habeas corpus was concerned.

In the Webb case, the Court said:

'No doubt the Enabling Act, followed by the adoption of the Constitution therein prescribed and the admission of the new State, had the effect of remitting to the State government the enforcement of the prohibition respecting the manufacture, sale, barter, etc., of intoxicating liquors within the State, and respecting commerce in such liquors conducted wholly within the State, and to the extent that the scheme of prohibition established by the Enabling Act covered the same field that had been covered by the Act of 1895, the latter Act must be considered as impliedly repealed.'

Here is a distinct holding that the Enabling Act had the effect of remitting to the State government the enforcement of that portion of said Section 8 respecting the manufacture, sale, barter, etc., of such liquors, conducted wholly within the State, and respecting commerce in such liquors conducted wholly within the State. The field covered by the scheme of prohibition established by the Enabling Act was that of the manufacture, sale, barter, etc., within the portions of the State affected by this provision of the Act, and the introducing of such liquors from other portions of the State into such affected portions. Prior to Statehood, Section 8 of the Act of 1895 had covered these offenses, as well as that of introducing from other States into the Indian Territory, so that it follows that by the Enabling Act that portion of said Section 8 relating to the manufacture, sale, barter, etc., of such liquors within what was formerly Indian Territory, as well as the introduction of such liquors from other portions of the State into that portion of the State, was impliedly repealed. * * *

But the clear import of the Webb case is that, so far as it relates to the introduction of liquor from points in Oklahoma outside of what was formerly Indian Territory into that portion of the State, the Act of March 1, 1895, has been repealed by the Enabling Act, notwithstanding the reservations therein contained. So far as the effect of the Enabling Act upon the Act of March 1, 1895, is concerned, the foregoing conclusions are sustained by the opinion of Judge Cotteral of the Western District of the State, recently rendered in the case of the United States v. 56 gallons of whiskey et al., not yet officially reported.

It must follow that the provisions of R. S., Sec. 2139, as amended by the Act of 1892 and the Act of 1897, so far as they related, if at all, to the introduction of liquor into the Indian Territory from points outside of that territory, but within what is now Oklahoma, must be considered as having been repealed by the Enabling Act.

The portion of Section 8 of the Act of 1895 not repealed must, therefore, be construed to read substantially as follows:

'That any person, whether Indian or otherwise, who shall carry or in any manner have carried, or who shall be interested in carrying or in any manner having carried into that portion of the State of Oklahoma formerly comprising the Indian Territory, from any point without the State of Oklahoma, any vinous, malt, or fermented liquors or any other intoxicating drinks of any kind whatsoever whether medicated or not, shall, upon conviction thereof,

be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month or more than five years.'

This confines offenses of this character, of which the Federal Court has jurisdiction, to those in which the liquor is introduced from a point without the State. It is a violation of the State law, as established by the constitutional provision above referred to, to introduce liquor into what was formerly Indian Territory from some other portion of Oklahoma, but such violation is an offense exclusively within the jurisdiction of the State Court. In order to give the Federal Court jurisdiction, it is necessary that the introduction of the liquor should have been from a point without the State. This is an essential element of the offense, so far as the Federal Court is concerned, and should therefore be charged in the indictment. It follows that the demurrer must be sustained."

It is true that in the cases cited the indictment charges the commission of a substantive offense, while in the case at bar the indictment is for conspiracy to violate the Acts themselves.

It charges that the defendants "did then and there unlawfully, wilfully, knowingly anl feloniously conspire together to commit an offense against the United States of America, to-wit, to unlawfully, knowingly and feloniously introduce and attempt to introduce malt, spiritous, vinous and other intoxicating liquor into the Indian country, which was formerly Indian Territory, and now is included in a portion of the State of Oklahoma, and into the City of Tulsa, Tulsa County, Oklahoma, which was formerly within and is now a part of what is known as the Indian Country, and into other parts and portions of that part of Oklahoma which lies within the Indian Country."

The indictment does not charge the defendants with conspiring to commit the offense of *carrying* intoxicating liquors from a point without the State of Oklahoma *into* what was formerly Indian Territory.

The fact that it is alleged in the several overt acts of the indictment that certain quantities of whiskey were *delivered* to the American Express Company *to be* shipped and transported from Joplin, Jasper County, Missouri, to Tulsa, Tulsa County, Oklahoma, does not so aid the conspiracy charge as to make it state an offense. In the charge of conspiracy the union for an unlawful purpose constitutes the crime, and the allegations contained in the overt act do not so aid the allegation of conspiracy as to give the offense charged in the conspiracy section the criminal quality that is absent without the allegations found in the overt act.

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United States v. Britton, 108 U. S. 199, 204.
Pettibone v. United States, 148 U. S. 197, 203.
Dealy v. The United States, 152 U. S. 539, 547.
Bannon v. United States, 156 U. S. 464, 468, 469.

In the case of The United States v. Britton, the Supreme Court, speaking through Mr. Justice Woods, said:

"'The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a locus penitentioe, so that before the act is done, either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under Section 5440 *the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.* Reg. v. King, 7 Q. B.782; Commonwealth v. Shedd, 7 Cush. 514.'

The case was followed in Pettibone v. United States to the effect 'that the conspiracy must be sufficiently charged and cannot be aided by averments of acts done by any one or more of the conspirators in furthering the object of the conspiracy.'

In Dealy v. United States it is said that 'the gist of the offense is the conspiracy. * * * Hence, if the conspiracy was entered into within the limits of the United States and the jurisdiction of the Court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done anywhere."

It is true the Supreme Court has recently modified that doctrine in the Hyde case, to the extent of holding that the allegations contained in the overt acts of the indictment assist in establishing the venue and confer jurisdiction in the district where the overt acts were committed, although the conspiracy itself was formed in some other State or district.

But in the case at bar the allegations contained in the overt act, even if read together with and as a part of the charge of conspiracy, are not sufficient to cause the indictment to charge the defendants with the commission of an offense against the laws of the United States.

The Act of 1897 makes it an offense to introduce *or attempt to introduce* whereas the Act of 1895 makes it an offense to "carry or in any manner have carried *into* said territory any liq-

uors or drinks," etc. The Act of 1897, makes it an offense to introduce *or attempt to introduce* while there can be no violation of the Act of 1895 unless the intoxicating drinks are actually *carried into* the Territory. Under the Act of 1897 an attempt to carry liquor into Indian Territory would be an offense, whereas under the law of 1895 a completed act of carrying the liquor into the Territory must have been performed.

It will thus be seen that, under the indictment, the defendants in this case were tried for conspiring to *attempt to introduce* of which offense it is clear the Court had no jurisdiction, because the Act of 1895 did not inhibit an attempt to introduce.

Again, a reading of the indictment herein discloses the fact that in neither charge of conspiracy or in the overt act is the allegation directly made that the defendants *did carry* the said whiskey into what was formerly Indian Territory, the only allegation contained in the indictment being that the said defendants did "*deliver*, and cause to be delivered to the American Express Company * * * 2 certain boxes or packages, in each of which were contained 6 cases or kegs of spiritous, intoxicating liquors * * * *to be shipped and transported* from Joplin, Jasper County, Missouri, by said American Express Company to Tulsa, Tulsa County, Oklahoma, *and* in the said *Indian* country."

Clearly the indictment does not charge the defendants with an offense, even though the overt act, for the sake of argument, be admitted to be a part of the charge of conspiracy. Nowhere does it charge the defendants with having actually carried the liquor in question into what was formerly Indian Territory. It does not charge the *completed act* as is necessary to be charged under the provisions of the law of 1895. As was said by Circuit Judge Sanborn in the Schaap case (Supra, p. 857), "there is no prohibition in the Act of 1895 of *an attempt* to introduce or carry intoxicating liquors into Indian Territory." The case might be different if the indictment directly charged in the conspiracy clause that the defendants conspired to commit an offense against the laws of the United States, to-wit, the offense of carrying into said Territory said intoxicating liquors from a point without the State of Oklahoma into that portion of Oklahoma which was formerly Indian Territory. Then the allegation, as found in the overt act, might possibly be sufficient, but having failed to charge the defendants with a conspiracy to perform the completed act, to-wit, carry into Indian Territory the said whiskey, the allegation, that they did *deliver to be shipped* the consignment of liquor in question, must perforce be insufficient.

It is extremely doubtful whether the allegation of delivery for shipment would be sufficient if charged as an overt act where the conspiracy charge was definitely and fully set forth, but where it must be relied upon to assist in perfecting the charge of conspiracy, it wholly fails.

The act of delivery for shipment is not a completed act under the statute. It may never have been accepted for shipment by the common carrier, the express company. The defendants, themselves, might have withdrawn the order to ship. They might even have stopped it in transit at Baxter Springs, Kansas, or at any other point in prohibition territory before it reached that portion of the State of Oklahoma formerly known as Indian Territory. Wholesale liquor companies were accustomed frequently to do that very thing. The overt act was not completed until the shipment was in fact carried into Indian Territory. This is especially pertinent because the allegations of the conspiracy in this indictment are in themselves insufficient, and if the indictment is to stand at all, it must stand assisted by the recital contained in the alleged overt acts; but they fail or are insufficient, and the indictment must perforce fall.

In the Webb case (p. 674) the Court clearly intimates that the indictment therein is insufficient. It is not clear from the words used whether the Court had in mind the absence of the allegation that the liquor was shipped from a point without the State of Oklahoma to a point within the State, formerly known as Indian Territory, or whether the indictment was insufficient because of the defects hereinbefore set forth in this brief. The language of the indictment in the Webb case is substantially that used in the indictment in the case at bar. The language used in the indictment in the case of United States v. Wright, supra, is substantially that used in the indictment in this case. It is true that in neither of those cases is the charge that of conspiracy, but upon what grounds of good reason may it be held that those indictments are bad on demurrer, and that this indictment, the substantive offense of which is in fact the offense of *delivering for shipment* in an *attempt to introduce* certain liquors which might ultimately find their way into that portion of Oklahoma which was formerly known as Indian Territory.

If the decision of the Supreme Court in the Hyde case is construed to mean that the conspiracy charge and the overt act are construed together as charging the offense, then the indictment is bad because it in fact attempts to charge that the defendants conspired to introduce and attempt to introduce intoxicating liquors, etc., into Indian Territory by delivering to the American Express Company at Joplin, Missouri, for shipment a consignment of liquors. The whole indictment then is nothing more than a conspiracy to *attempt* the shipment and, as Judge Sanborn says, it is not in violation of the law of 1895 to attempt to carry liquor into Indian Territory.

Again, if this Honorable Court sustains its own opinion in the Webb case and Wright case, then the indictment is bad because it does not allege that the attempt to introduce was from a point without the State of Oklahoma, the presumption being to

the contrary, that the liquor was to be introduced in a lawful way from a point within old Oklahoma into what was formerly Indian Territory, rather than that the introduction was to be in an unlawful manner from a point without the State. There is always a presumption of lawful conduct and innocence rather than unlawful conduct and guilt. The presumption would be against unlawful conduct in this case.

Again, if this Honorable Court finds that the indictment does charge a conspiracy to commit two offenses, to-wit, a conspiracy against the law of 1895 and the law of 1897, then the indictment is bad because of duplicity, because, under the holding in the Hyde case (Supra) that the avert act is a part of the conspiracy charge, it must of necessity be held that the indictment states two offenses, to-wit, a conspiracy to introduce and attempt to introduce under the law of 1897 and a conspiracy to introduce and attempt to carry into Indian Territory intoxicating liquors in violation of the law of 1895. This question of duplicity will be discussed later under a separate head.

THE INDICTMENT DOES NOT STATE AN OFFENSE IN VIOLATION OF THE ACT OF 1897, AND THE COURT ERRED IN NOT SUSTAINING THE DEMURRER TO THE INDICTMENT AND THE MOTION IN ARREST OF JUDGMENT HEREIN.

The Appellate Court not only found that the indictment stated an offense against the Act of 1895, but that it also charged a conspiracy in violation of the Act of 1897. In this respect it committed error also.

The Appellate Court held that "the indictment charged a conspiracy to violate the laws of 1892 and 1897 to introduce and attempt to introduce intoxicating liquors into Indian country and into the city of Tulsa, Tulsa County, Oklahoma, which was formerly within and is now a part of what is known as the Indian country, and into other parts and portions of Oklahoma which lie in the Indian country." In so doing it held that the indictment charged two things, to-wit, a conspiracy to introduce and attempt to introduce into the city of Tulsa, and a conspiracy to introduce liquor into other parts and portions of Oklahoma which lie in the Indian country.

The Court did not expressly refuse to hold that it would not take judicial notice of the fact that Tulsa was not in the Indian country, but said:

> "If we even take judicial notice of the fact that Tulsa was not in the Indian country, the indictment charged also that the conspiracy was to introduce liquors into other parts and portions of Oklahoma which lie in the Indian

> country, and, until we should take judicial notice that no portion of Oklahoma was within the Indian country, the objection to the indictment could not be sustained."

The holding of the Appellate Court in this respect in both matters, in the opinion of counsel, is clearly erroneous.

First, the Court should have taken judicial notice of the fact that the city of Tulsa is not in the Indian country. The exterior limits of the town of Tulsa were established and the town surveyed and platted under the Act of June 28, 1898, c. 517, 30 Stat. 495, No. 14, and the Creek Agreement Act of March 1, 1901, 31 Stat. 861, 866, 867, No. 11, 12, 13, 14 and 23, authorizing the platting, appraisal and sale of this land. The records of the Department of the Interior, one of the co-ordinate branches of this Government, show that, on February 21, 1901, the Department approved the exterior limits of the town of Tulsa, whereby 654.58 acres were reserved from allotment and set aside for town-site purposes as Tulsa. The survey was made and the plat approved April 11, 1902. The town-site commission appraised and scheduled the lots, and such schedule and appraisement were approved by the Department June 13, 1902. Patents were issued and, at the time of the offense herein alleged, Tulsa was a city of 30,000 people.

The Court should have taken judicial notice of these Acts of Congress and these matters of public notoriety, and it committed error in not so doing.

In the case of

United States v. Friedman, 191 Fed. 673-680,

the Circuit Court of Appeals for the Eighth Circuit, speaking through Circuit Judge Smith himself, who wrote the opinion in the case at bar, said:

> "The Court has the right to take judicial notice not only of the legislation of Congress on this subject, but of all conditions in the Indian Territory which are matters of general and public notoriety."

It then does take judicial notice of certain Acts of Congress and certain reports of the Secretary of the Interior and of the Indian Office of the United States.

It continues:

> "By a joint resolution of Congress of March 2, 1906, 34 Stat. 822, and by the Act of April 26, 1906, 34 Stat. 148, No. 28, the tribal existence and governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes or Nations were continued in full force and effect until other-

wise provided by law. Under these laws the tribes and tribal governments still exist. Eighteen government Indian agents are still maintained in the Indian Territory, exclusive of a large force of clerks. The Office of Indian Affairs reports that on November 1, 1911, there were then on hand unallotted and undisposed of 2,977,416 acres of Indian lands in Indian Territory belonging to the Five Civilized Tribes, of which 1,154,072 acres would be offered for sale in November and December, 1911, etc."

Surely, if the Circuit Court of Appeals of the Eighth Circuit was bound to take judicial notice of the above Acts of Congress, it would be bound to take judicial notice of the general Acts of Congress, which go to make up the "town-site laws" of the State of Oklahoma, under which were established not less than fifty flourishing towns and cities in what was formerly Indian Territory. It would certainly be bound to take judicial notice not only of these Acts of Congress, but of the Acts of the Department of the Interior done under and by virtue of the power conferred in the Secretary of the Interior and the Commissioner of Indian Affairs by these Acts themselves.

The Court was bound to take judicial notice of the official opinions rendered by the Attorney-General of the United States as to these cities organized under the "town-site laws". So said the Court in the case of

Evans v. Victor, 204 Fed. 361-371,

in the following language:

> **"In 1898 the Attorney General of the United States was of the opinion that the lands in town sites authorized by the Acts of Congress which have been cited were not Indian country, and that the Federal liquor laws relative to the introduction of liquor into the Indian country and the search for it therein were not longer applicable to such lands. 22 Opinions of the Attorneys General, 232, 234.** In Dick v. United States, 208 U. S. 353, 28 Sup. Ct. 399, L. Ed. 520, the Supreme Court, as we have already seen, declared that in such a case as this in hand those laws were inapplicable. And in Clairmont v. United States, 225 U. S. 551, 558, 559, 32 Sup. Ct. 787, 56 L. Ed. 1201, the last decision on the question which has been found, the Supreme Court decided that lands, the original Indian title to which had been extinguished without any provision of a treaty or Act of Congress limiting the effect of that extinguishment, were not longer Indian country, were withdrawn from the effect of the Federal liquor laws relative to the introduction of liquor into the Indian country, the search for and seizure thereof, and that one who brought

liquor upon such lands could not be lawfully convicted of introducing it into the Indian country."

District Judge Campbell, in the opinion heretofore quoted sustaining the demurrer in the Wright case when that case was before him, said:

> "The Court must take judicial cognizance of the fact that a large portion of the State of Oklahoma is not now Indian country."

In the case of

Evans v. Victor, 204 Fed. 361,

the Circuit Court of Appeals for the Eighth Circuit, speaking through Circuit Judge Sanborn, p. 366, recognized the status of the cities organized under these "town-site laws" in the following language:

> "The Act of June 28, 1898, c. 517, 30 Stat., 495, ¶ 14, and the Creek Agreement (Act of March 1, 1901, 31 Stat. 861, 866, 867), ¶ 11, 12, 13, 14, and 23, authorized the platting appraisal, and sale of this land and of all other land within the original corporate limits of the city of Muskogee and the conveyance of the title of the Creek Tribe, and of the United States thereto, to the respective purchasers thereof under these Acts, free from every restriction, by deeds executed by the Principal Chief of the Creek Nation and approved by the Secretary of the Interior. The lands were platted, the lots were thus sold and so conveyed to the purchasers under these Acts, a decade ago. Thereby the Indian title to them was extinguished, and under the rule that had then been established for more than 20 years they ceased to be Indian country, and their owners and occupants became exempt from searches and seizures under Sections 2139 and 2140. In reliance upon these facts and this state of the law, the purchasers bought these lands, they and their grantees have built upon them business blocks, stores, warehouses, residences, and public buildings, and have become a prosperous mercantile community of more than 25,000 inhabitants, of whom not 5 per cent. are Indians."

What was said by the Court with reference to the city of Muskogee can be said with even greater force of the city of Tulsa. The existence of such a city is certainly a matter of such general and public notoriety as to bring it within the rule laid down by the Court in the Friedman case, (supra).

Surely the Courts are bound to take judicial notice of the Acts of Congress and the rules and regulations promulgated under

them by the Secretary of the Interior and the Commissioner of Indian Affairs, which have the force and effect of law. These town-sites were established under the Acts of Congress, and under the rules and regulations promulgated by the Secretary of the Interior, all of which are of record in that co-ordinate branch of the Federal Government. In that office are found the Acts of the Department officers, setting apart and approving the exterior limits of the town of Tulsa under date of February 21, 1901; the making of the survey and the plat, approved April 11, 1902; the appraisement and scheduling of the lots, and the issuing of the patents thereunder, under the town-site commission, approved by the Department June 13, 1902.

A different rule might apply where the charge was the introduction of liquor upon an Indian allotment.

In a case of that character it naturally would be incumbent upon the defendant to show that that particular allotment was no longer within the Indian country, but the cases are not parallel. The one is an individual act of taking an allotment, whereas the town-site of Tulsa was established by an Act of Congress and the rules and regulations promulgated thereunder by the Secretary of the Interior, which have the force and effect of law.

It is submitted that the Appellate Court erred in not expressly taking judicial notice of the Acts of Congress and of the Acts of a co-ordinate branch of the Government, to-wit, the Department of the Interior, and for this reason this Court should by certiorari review the action of the Appellate Court.

IF IT WAS THE DUTY OF THE APPELLATE COURT TO TAKE JUDICIAL NOTICE OF THE FACT THAT THE CITY OF TULSA IS NO LONGER IN THE INDIAN COUNTRY, THEN THE REMAINDER OF THE INDICTMENT IS BAD BECAUSE OF INDEFINITENESS AND UNCERTAINTY OF THE CHARGE.

The Appellate Court did not think it necessary to find that the city of Tulsa was no longer in the Indian country, because it found that the indictment charged also that there was a conspiracy to introduce and attempt to introduce intoxicating liquor "into other parts and portions of Oklahoma which lie in the Indian country."

It is submitted that the Court erred in this respect. It surely spoke inadvisedly, for no Court should hold that an indictment was sufficient which charged a defendant with so uncertain an offense as introducing or attempting to introduce intoxicating liquors "into other parts and portions of Oklahoma which lie in the Indian country." The allegation in the indictment is so vague and uncertain and indefinite as to bring it within the scope of the

grounds set forth in the Demurrer and Motion in Arrest of Judgment, to-wit, that, if the indictment does state a public offense, "it does not charge the same with sufficient accuracy and certainty to apprise the defendants, and each of them, of the offense with which he is charged so that he may properly prepare his defense in the case." (Rec. p. 8, Fol. 12, Rec. p. 16, Fol. 28.)

The allegations of conspiracy are not assisted in any manner by the overt acts, because they charge nothing but an offer to deliver for shipment to the city of Tulsa, and, if the city of Tulsa is no longer in the Indian country, then the indictment might just as well have alleged that, to effect the object of the conspiracy, the defendants went out and took a drink of Coca-cola.

Could the defendants be put to trial upon so indefinite a charge as that? If so, how could they properly prepare their respective defenses?

There were more than a hundred thousand allotments made to Indians of the Five Civilized Tribes alone, and the Courts will take judicial notice of the fact that the restrictions have been removed from three-fourths of the allotments of the mixed-bloods by direct legislation of Congress. It will take judicial notice of the fact that tens of thousands of acres of this territory, formerly known as Indian country, have been removed from the Indian country, or were never in it at all, by reason of the general Acts of Congress hereinbefore referred to, known as the "town-site laws". Certainly the defendants in this case, if put to trial charged with an offense of introducing liquors into the Indian country, would be entitled to know in advance of the trial whether they were charged in the indictment with introducing liquors upon restricted or unrestricted allotments, upon town-sites such as Muskogee and Tulsa and a hundred other cities and towns of Oklahoma which were removed from the Indian country under the "town-site laws," or upon unallotted Tribal lands.

An indictment of that kind might be made to stand where the charge was the carrying of liquor into Indian Territory, because the confines of Indian Territory are marked out and defined, but an indictment attempting to charge the introduction of liquors into the Indian country, without stating what Indian country any more definitely than that it was located in the State of Oklahoma, would surely fall where the question was properly raised by demurrer, as it was in this case.

This is an error which this Court should remedy by certiorari.

IF THE RULINGS OF THE APPELLATE COURT HEREIN COMPLAINED OF ARE NOT ERRONEOUS, AND THE INDICTMENT DOES CHARGE A CONSPIRACY TO COMMIT AN OFFENSE AGAINST THE ACT OF 1895 AND A CONSPIRACY TO COMMIT AN OFFENSE AGAINST THE ACT OF 1897, THEN THE INDICTMENT IS BAD FOR DUPLICITY.

The books are full of authorities holding that an indictment which charges the commission of two distinct offenses in one count is clearly duplicitous.

John Gund Brewing Company v. United States, 204 Fed. 17, and authorities there cited.

The distinction between charging a defendant with conspiring to commit two different offenses and charging the same defendant with committing the two offenses themselves, is a pure myth as far as the rights of the defendant are concerned. Why should the one be declared duplicitous and the other not as far as the constitutional rights of the defendant are concerned,—the right to know beforehand the specific charge with which he stands indicted so that he may properly prepare his defense?

In this case he stands charged with conspiracy to commit two offenses,—not one offense, but two offenses. He stands charged with conspiring to violate the Act of 1895 and with conspiring to violate the Act of 1897. What is the difference between that kind of a charge and the kind that charges in one count that he did violate the Act of 1895 and did violate the Act of 1897? In the case of J. O. Ammerman v. United States, argued at the May Term, 1914, in which an opinion was filed on July 8, 1914, and not yet reported, the Court, speaking through Circuit Judge Sanborn, found that an indictment was duplicitous which charged the defendants with introducing and carrying liquor into the Indian country and into the Indian Territory, a violation of the Act of 1897 and the Act of 1895, and held that the lower Court erred in not sustaining the Demurrer upon the ground of duplicity, in the following language:

> "It will be noticed that the punishment provided for a violation of the Act of 1897 is imprisonment for not less than sixty days and a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter, but provides for no maximum imprisonment or fine.
>
> In view of the fact that the Act of 1897 is an amendment to the Act of July 23, 1892, 27 Stat. 260, as was held by the Supreme Court in United States v. Wright, 229 U. S. 226, 230, it may be assumed, although we do not deem

it necessary to determine it in this case, that the maximum punishment provided for in the Act of 1892 is still in force. * * *

It will thus be seen that the Acts of 1895 and 1897 create distinct offenses, punishable differently and necessitating evidence of a different character to justify a conviction. The Act of 1897 prohibits the introduction of intoxicating liquors into the Indian Country, and expressly defines what shall be Indian Country within the meaning of the Act. On the other hand the Act of 1895 prohibits the introduction of liquors into the Indian Territory as it then existed, and which Act, it has been authoritatively held, is still in force in that part of the State of Oklahoma which, before the State was admitted into the Union, constituted the Indian Territory. Ex parte Webb, 225 U. S. 663; United States v. Wright, supra; United States Express Co. v. Friedman, 191 Fed. 673, 112 C. C. A. 219; and the late case of Joplin Mercantile Co. v. United States, 213 Fed. 926.

The indictment, it will be noticed, charges a violation of both statutes. It charges that 'in the county of Tulsa, and State of Oklahoma, the said county then and there being a portion of the Indian country of the United States of America, did introduce and carry into said Indian Country from without said Indian Country and from without said district and from without the State of Oklahoma one quart of alcohol * * * The said county and district having been a portion of the Territory of the said United States known as the Indian Territory, and at all times was and is now a part of the Indian Country of the said United States of America.'

The first part of the indictment charges the introduction of intoxicating liquors into that part of Tulsa County which is Indian Country, and the latter part of the indictment charges the defendant with having introduced intoxicating liquor into the county, which was a portion of the Territory of the United States known as the Indian Territory.

This is clearly duplicitous, as was held by this Court in John Gund Brewing Co. v. United States, 204 Fed. 17, 122 C. C. A. 331, and authorities there cited.

Perhaps no better illustration of the danger of permitting such an indictment to stand can be found than this case affords. The verdcit of the jury finds the defendant guilty as charged in the indictment. Does this mean that the defendant was guilty of violating the Act of 1895 or the Act of 1897? The learned trial judge was evidently of the opinion that the defendant was guilty of violating the Act of 1895, introducing intoxicating liquors into that part of the State of Oklahoma which was formerly the Indian Territory, for he sentenced him to imprisonment in

the penitentiary for three years, while under the Act of 1897, treating it as leaving the maximum punishment provided in the Act of 1892 still in force, confinement in prison is limited to two years.

We are of the opinion that the Court below erred in overruling the demurrer to the indictment, and the cause is reversed with direction to set aside the judgment and sustain the demurrer to the indictment."

Why does not the reasoning of the Court in the above apply with equal force to the case at bar? Why does not the indictment in the case at bar charge two offenses? Is it not alleged (if the Court so finds it) that the defendants conspired to commit an offense against the law of 1895 and conspired to commit an offense against the law of 1897? While the charge is conspiracy, a violation of Section 5440, yet the defendants were in fact tried for conspiring to violate two different sections. The line of proof required would be exactly the same except the union for a common purpose. Why have the Courts uniformly held that an indictment which charges two offenses in the same count is bad for duplicity? There is something back of that word "duplicity." It is a violation of a constitutional right, the right of the defendant to know beforehand just what particular offense he is being charged with. The Government and the Courts, since the decision in the Hyde case, must assume one of two positions with respect to these matters. If the overt act is such a part of the conspiracy as to make the indictment good where it otherwise would be bad, then it takes the whole of the indictment, to-wit, the charge of conspiracy plus the overt act, to charge the offense. If that is the case, then all of this fiction about conspiracy being the sole charge upon which the defendant is tried fades away. If in the case at bar, this Court sustains its holding in the Webb case and in the Wright case, then the indictment herein is not good as an offense against the law of 1895, because it fails to allege that the conspiracy was to introduce liquor into Indian Territory from a point without the State of Oklahoma and, if this Court shall hold that the conspiracy charge is not the gist of the offense and is aided by the allegations contained in the overt act, then perforce it must hold that the conspiracy charge and the overt act together go to make up the indictment. If so, then it must be said with equal force that the indictment does charge in one count two distinct offenses, and it is therefore duplicitous.

In the case of

John Gund Brewing Company v. United States, 204 Fed. 17-20,

which was overruled in 206 Fed. 386, the first thought of the Court, in 204 Federal, was the better. It was along the line of reason and judgment. For the moment it overlooked the fiction which discriminates between the conspiracy charge and conspiring to commit several offenses. The first holding of the Court in

that case should have stood as the law.

The rules of evidence in the trial of a conspiracy charge are already broad enough in their scope where only one offense is charged. They should not be enlarged and amplified by permitting defendants, oftentimes innocent, to be put to trial for violation of a number of statutory offenses. The defendant cannot be accorded a fair trial. The jury is bound to be influenced and prejudiced by the introduction of many, many matters under the several different charges, a conspiracy to do which is never proven. Under a charge of that nature he cannot possibly have the fair trial guaranteed to the defendant by the Constitution of his country and the laws of the land.

The Appellate Court erred in not finding the indictment duplicitous, and the error should be remedied by certiorari in this case.

THE COURT ERRED IN HOLDING THAT THE JOPLIN MERCANTILE COMPANY, A CORPORATION, CAN BE LAWFULLY INDICTED AND CONVICTED FOR CONSPIRACY, WHICH BY STATUTE IS DECLARED A FELONY.

It was urged before the Trial Court on Demurrer, Motion to Quash, and Motion in Arrest of Judgment, that the indictment and conviction of the Joplin Mercantile Company, a corporation, could not stand, because the offense of conspiracy declared by statute to be a felony, was of such a nature that it was impossible for a body corporate to participate therein with such an evil intent as to make it liable under statute. By Section 335 of the new Penal Code, offenses, which may be punished by death or imprisonment for a term not exceeding one year, shall be deemed felonies. The penalty for violating the provisions of Section 5440 R. S., Sec. 37 of the Penal Code, may be imprisonment for a term of not more than two years, and is therefore a felony. It was formerly held that corporations could not be convicted of an offense, the essential element of which was an evil intent, and, while that doctrine has been in recent years modified to some extent, counsel is unable to find any authoritative decision from this Court to the effect that a corporation can be convicted of a felony, and especially of that class of felonies involving the evil intent such as is necessary in acts of conspiracy to violate a criminal statute of the United States. The Supreme Court of the State of Missouri, in a recent decision, has declared, "A corporation cannot have a felonious intent. It cannot therefore be prosecuted for felony." (State ex. inf. v. Delmire Jockey Club, 200 Mo. Reports, 48,)

In the case at bar Joseph Filler was personally indicted and convicted for his own participataion in the alleged conspiracy,

and the Joplin Mercantile Company was indicted and convicted because of its participation therein through its president, Joseph Filler. The Circuit Court of Appeals was of the opinion that the conviction of the Joplin Mercantile Company should stand. An authoritative opinion is requested from this Court upon the question herein involved. The corporation was indicted and convicted in the Southwestern Division of the Western District of Missouri in the face of the authoritative opinion of the Supreme Court of the State that such a conviction could not be had.

The error of the Appellate Court in sustaining the conviction should be reviewed by this Court on certiorari.

It is respectfully submitted that the points herein made are based upon matters of serious concern, and are of such general and public importance as affects procedure in the Courts of the United States, and that the errors committed by the Appellate Court in sustaining in all things the judgment of the lower Court are errors which should be remedied by this Court and that a writ of certiorari should issue.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

JOPLIN MERCANTILE COMPANY AND JOSEPH Filler, petitioners,
v.
THE UNITED STATES.
No. 648.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

STATEMENT.

Petitioners were convicted under an indictment charging them with conspiracy to commit an offense against the United States, " to wit, to unlawfully, knowingly and feloniously introduce and attempt to introduce malt, spirituous, vinous and other intoxicating liquors into the *Indian Country,* which was formerly the Indian Territory and now is included in a portion of the State of Oklahoma, *and* into the City of Tulsa, Tulsa County, Oklahoma, which was formerly within and is now a

part of what is known as the Indian Country, *and into other parts and portions of that part of Oklahoma which lies within the Indian Country.*" (R. 5.) The company was sentenced to pay a fine of one thousand dollars and the costs of the prosecution. Filler was sentenced to imprisonment for one year and a day. Upon writ of error the Circuit Court of Appeals affirmed the judgment of conviction (213 Fed. 926; R. 34 *et seq.*), holding, in substance, that the indictment was good under the act of March 1, 1895, ch. 145, 28 Stat. 693, 697, as well as under section 2139 R. S., as amended July 23, 1892, ch. 234, 27 Stat. 260, and January 30, 1897, ch. 109, 29 Stat. 506.

Concretely stated, the petitioners rely upon the following grounds as justifying the issuance of the writ in this case: (1) That the indictment can not be construed as charging a conspiracy to violate the act of 1895, because the language employed by the pleader is that contained in the acts of 1892 and 1897, and, further, that it is not charged that the introduction of liquor was to be from without the State, the contention in this respect being that under the decisions of this court in *Ex parte Webb*, 225 U. S. 663, and *United States* v. *Bob Wright*, 229 U. S. 226, the act of 1895 is no longer applicable to intrastate shipments of liquor into old Indian Territory; (2) that the indictment can not be construed as charging a conspiracy to violate the acts of 1892 and 1897, because the court should have taken judicial notice of the fact that Tulsa, one of

the places to which the liquor was to be shipped, was not " Indian country "; that had such judicial notice been taken, the remainder of the indictment would be bad for uncertainty; (3) that the indictment is bad for duplicity, if, as construed by the lower appellate court, it charges a conspiracy to violate the acts of 1892, 1895, and 1897; and (4) that a corporation can not be lawfully indicted and convicted for a felony.

It is plain that in the final analysis the solution of these questions merely requires a construction of the indictment in this particular case. The salient facts set forth in the indictment show a violation of one or more of the acts drawn in question, which acts have been held by this court in *United States* v. *Bob Wright,* 229 U. S. 226, to be operative in the State of Oklahoma. The only question really at issue is whether the facts in the present case have been so set forth in the indictment as to meet the tests of proper pleading. Obviously this is not such a question of gravity and general importance as to merit review by this court under certiorari. *Fields* v. *United States,* 205 U. S. 292, 296. We proceed, however, to discuss the points briefly.

ARGUMENT.

I.

Petitioners' contention below that the indictment could not be sustained under the act of 1895 because it was not alleged that the introduction of liquor was to be from without the State, led the

Circuit Court of Appeals to examine exhaustively into the question as to the applicability of this statute to intrastate shipments, with the result that it reached the conclusion that the act did apply to such shipments. As stated in its opinion, it did not regard the question as foreclosed by the decisions of this court in *Ex parte Webb*, 225 U. S. 663, and *United States* v. *Bob Wright*, 229 U. S. 226, wherein the nonapplicability of the act of 1895 to intrastate shipments appears to have been assumed rather than decided. No further discussion of the point seems necessary here, for whether the court below was right or wrong, as pointed out in its opinion "the conviction may also be sustained upon another ground," to wit, that the indictment also charges a conspiracy to violate the laws of 1892 and 1897. (R. 44.) This ground, if valid, would preclude a reversal of the judgment. *Williams* v. *United States*, 168 U. S. 382, 389; *Ex parte Crane*, 5 Pet. 190, 204.

II.

The contentions (1) that the indictment is not good under the acts of 1892 and 1897, because Tulsa, one of the points in which they are charged with conspiring to introduce liquor, is claimed not to be within the "Indian country," and the court should have taken judicial notice of that fact; and (2) that had such notice been taken, the remainder of the indictment charging conspiracy to introduce liquor into other parts of the "Indian country"

would be bad for uncertainty, are without merit at this stage. There has been a trial and conviction, and in the absence from the record of the testimony and charge of the court it can not be assumed that the Government failed to prove the shipment of liquor into the " Indian country " or that the trial court would have permitted the verdict to stand without such proof. So that the question whether Tulsa is within the " Indian country," and if not, whether the court should have taken judicial notice of that fact, becomes immaterial in view of the charge in the indictment that petitioners conspired to introduce liquor into *other* portions of the " Indian country." It may be that the indictment would be more satisfactory if it gave fuller information as to the places in the " Indian country," other than Tulsa, to which petitioners conspired to ship the liquor; but, as stated in *Durland* v. *United States,* 161 U. S. 306, 315, if they " desired further specification and identification " they " could have secured it by demanding a bill of particulars." This they did not do, and after verdict the alleged defect should be treated as one of form only, under section 1025 R. S. *Rosen* v. *United States,* 161 U. S. 29, 32. There is no showing that petitioners have been prejudiced in this respect.

III.

The claim that the indictment is duplicitous because the Circuit Court of Appeals construed it as charging a conspiracy to violate more than one

law is disposed of adversely to petitioners in *John Gund Brewing Company* v. *United States,* 206 Fed. 386, overruling same case, 204 Fed. 17–21 (the overruled decision alone being cited and relied on by petitioner (petition, pp. 11–49).

IV.

The contention that a corporation can not be lawfully indicted and convicted for a felony deserves no extended discussion, for the authorities are otherwise. See *United States* v. *Union Supply Co.,* 215 U. S. 50, 55; *United States* v. *MacAndrews and Forbes Co.,* 149 Fed. 823; *Cohen* v. *United States,* 157 Fed. 651.

V.

Petitioners appear to have been lawfully convicted, and it is submitted that the prayer of their petition should be denied.

JOHN W. DAVIS,
Solicitor General.
WILLIAM WALLACE, Jr.,
Assistant Attorney General.

OCTOBER, 1914.

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In the
Supreme Court of the United States

October Term, 1914

JOPLIN MERCANTILE COMPANY AND JOSEPH FILLER,
Petitioners,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

No. 648

Brief in support of position that under Const. U. S. Art. 1, Secs. 8 and 9, the Act of Congress known as the Oklahoma Enabling Act superseded and displaced the Act of March 1st, 1895, prohibiting the introduction of intoxicating liquor into the former Indian Territory.

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STATEMENT

The writers of this brief represent a number of persons accused of violating that provision of Section 8 of the act of Congress approved March 1st, 1895 (Chap. 145, 28 Stat. 693, 697), prohibiting the introduction of intoxicating liquors into the former Indian Territory. In some of these cases the introduction of liquor from without

the State of Oklahoma is charged. In others, it is charged that the liquor was introduced into the former Indian Territory from other parts of the State of Oklahoma. In some of the cases, indictments have been returned, but trials have not yet been had. One case in which two of the signers of this brief are of counsel is pending in the Circuit Court of Appeals for the Eighth Circuit. (Arch Wright vs. United States of America, No. 4318.) This last mentioned case is assigned for argument on January 20th, 1915. The defendant in that case was convicted on a charge of having introduced intoxicating liquor into the former Indian Territory from without the State of Oklahoma. The questions presented in this brief are urged in the brief in the Wright case in the Circuit Court of Appeals. In none of these cases is there any probability that the defendants may be heard by this court before the decision of this case, except through the medium of this brief.

It is not our intention to touch upon the ground covered in the brief of the petitioner, except in so far as it may be unavoidable. It is the position of petitioners, as we understand it, that it was decided by this court in *Ex parte* Webb, 225 U. S. 663, and United States vs. Wright, 229 U. S. 226, that the act of March 1st, 1895, was superseded by the Oklahoma Enabling Act and the state legislation enacted thereunder, in so far as it had applied to the introduction of intoxicating liquor into the former Indian Territory from other parts of the State of Oklahoma.

Our brief will be devoted to an effort to show to the court that, regardless of whether the question was decided in the Webb and Wright cases or not, the Enabling Act must be held to relinquish to the state the exclusive control of these intrastate transactions or to be repugnant to Article 1, Section 8, of the Constitution of the United States, because under that constitutional provision both state and nation cannot regulate the same commerce at the same time; that the Enabling Act must therefore be construed as relinquishing exclusive control to the state, because it is only when it is attempted to retain the act of March 1st, 1895, in force as a concurrent regulation of such commerce that the constitutional objection to the Enabling Act arises, and there is nothing in the latter act requiring a holding that congress intended that both state and nation should regulate this commerce. This position is not urged in petitioner's brief.

We shall further briefly discuss the question of the power of congress to retain the act of March 1st, 1895, in force as a prohibition against the introduction of intoxicating liquors into the former Indian Territory from other states. It is our position that if the act of March 1st, 1895, be held to have been superseded as to intrastate transactions by the Enabling Act, it cannot be retained in force as a prohibition against the introduction of intoxicating liquors into the former Indian Territory from other states, under Const. U. S., Art. 1, Sec. 9, forbidding the giving of a preference by any regulation of commerce to the ports

of one state over those of another. We contend that, treated as a regulation of interstate commerce, it discriminates against the State of Oklahoma by forbidding such commerce in intoxicating liquors with a large part of Oklahoma, while permitting it with all of the other states; and, treated as a regulation of commerce with the Indian tribes, it gives a preference to the State of Oklahoma by exempting that state from the federal prohibition and permitting Oklahoma to regulate for itself the commerce in intoxicating liquors between other parts of said state and the former Indian Territory, while denying to the people of the other states of the Union, under the penalty of fine and imprisonment, the right to engage in such commerce. This question is not suggested in petitioner's brief.

In passing upon the case at bar it may be unnecessary for the court to determine whether the act of March 1st, 1895, may be retained in force as to introductions of liquors from other states. However, we have briefly argued this question, not only because it may be decided in the case at bar, but for the further purpose of showing to the court that a substantial objection to the constitutionality of the act of 1895, as applied to interstate transactions, hinges upon the decision of the question as to its application to intrastate transactions. It is apparent, therefore, that persons accused of the introduction of liquor from other states have a vital interest in the decision of the question as to the application of the act of congress to intrastate transactions.

ARGUMENT

Having stated our positions, we now proceed to the discussion of our first proposition, viz:

I.

The provision of Section 3 of the Oklahoma Enabling Act (34 Stat. L. 267), requiring the State of Oklahoma to forbid, under penalties, the introduction of intoxicating liquor from other parts of the state into the former Indian Territory, can be upheld only by construing it as repealing Section 8 of the Act of March 1st, 1895 (28 Stat. L. 697), in so far as that Act dealt with such intrastate transactions. Otherwise, the provision of the Enabling Act must be held to be repugnant to Article 1, Section 8, Constitution U. S., as an attempt to authorze the concurrent regulation of commerce which must be exclusively regulated either by State or Nation. The Enabling Act is susceptible of a reasonable construction, which will avoid such conflict with the constitution.

It was said by Mr. Justice White, speaking for this court, in United States ex rel. Attorney General vs. Delaware & Hudson Company, 213 U. S. 366, 407, that: "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. Knights Templars' & M. Life Indemnity Co. vs. Jarman, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute

is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter. Harriman vs. Interstate Commerce Commission, 211 U. S. 407."

We submit that it is clear that the Enabling Act may be reasonably construed as relinquishing to the state exclusive control over commerce in intoxicating liquors between other parts of the State of Oklahoma and the former Indian Territory. We submit that it is equally clear that the gravest constitutional questions arise if the act is given any other construction. Before passing to the consideration of such constitutional objections, let us pause for a moment to consider the question of the reasonableness of the construction of the Enabling Act for whi[illegible] we contend.

In the first place, no violence is done to the language of the Enabling Act by construing it as a relinquishment to the state of exclusive control over intrastate transportation of liquor. No specific reference is made in the Enabling Act to the continued exercise of Federal control over such intrastate transportation. If Federal control remains notwithstanding the admission of the state, it can only be because the same is not inconsistent with the will of congress,

expressed in the Enabling Act, that the state should exercise control over such commerce. Whatever may have been provided by treaties with the several Indian nations and by the prior acts of congress on the subject, it is clear that unless the Enabling Act and such prior acts of congress and Indian treaties may remain in force concurrently, the Enabling Act, being the latest expression of the congressional intent, must be enforced, unaffected by anything contained in the earlier acts and treaties. Ward vs. Race Horse, 163 U. S. 504, 511; The Cherokee Tobacco, 11 Wall. 616; Thomas vs. Gay, 169 U. S. 264; Stevens vs. Cherokee Nation, 174 U. S. 445, 483; Whitney vs. Robertson, 124 U. S. 190.

It can hardly be said that a construction of the Enabling Act as a relinquishment by congress to the state of exclusive and undivided control over intrastate transportation of liquor is an unreasonable construction, when it is borne in mind that that construction has been conceded by the government to be the proper construction and has been accepted as such by this court in at least two cases.

In *Ex parte* Webb, 225 U. S. 663, 56 L. Ed. 1248, this court said:

"No doubt the enabling act, followed by the adoption of the constitution therein prescribed and the admission of the new state, had the effect of remitting to the state government the enforcement of the prohibition respecting the manufacture, sale, barter, etc., of intoxicating liquors within the state, and respecting commerce in such liquors conducted wholly within the state; and, to the extent that the

scheme of prohibition established by the enabling act covered the same field that had been covered by the act of 1895, the latter act must be considered as impliedly repealed."

In United States vs. Wright, 229 U. S. 226, 235, 57 L. Ed. 1160, 1166, the court said:

"In the Webb case, as appears from the opinion, p. 676, the government conceded that the act of 1895 had been repealed by the enabling act and the admission of the state thereunder, saving so far as it prohibited the carrying of intoxicating liquors, etc., from another state into the territory. The statement to the like effect in the opinion, p. 681, was made in view of this concession; but we see no reason for recalling it. The language used was: * * *"

(The court here quoted the above passage from the opinion in the Webb case.)

It must be conceded, we think, that the Enabling Act may reasonably be construed as relinquishing to the state exclusive control of this intrastate commerce.

Let us now pass to the consideration of the question of the validity of Section 3 of the Enabling Act, if construed as a requirement upon the state to regulate such commerce and at the same time to retain Federal control thereof.

We submit that the gravest objections to the constitutionality of the act arise, if it be given such a construction. In fact, as we read the decisions of this court, the unconstitutionality of this provision of the Enabling Act is clear if it be construed as contemplating the concurrent regulation of this commerce by the State and Nation.

It may be conceded for the purpose of this argument that it was within the power of congress to maintain the act of March 1st, 1895, in force after the admission of the state. For the purpose of the argument, we question, not the existence of the power, but its exercise. We contend that, assuming the power of congress to retain control over commerce in intoxicating liquor, between that part of the state which was formerly Oklahoma Territory and the former Indian Territory, such power could have been exercised only by means of legislation exclusively regulating such commerce, and that the enabling act, authorizing and requiring as it does the regulation of such commerce by the state, is inconsistent with the continued exercise of congressional control over such commerce.

In other words, our contention, stated in the language of *Ex parte* Webb, 225 U. S., at p. 681, is that "to the extent that the scheme of prohibition established by the enabling act covered the same field that had been covered by the act of 1895, the latter act must be considered as impliedly repealed." We contend that the enabling act clearly provided that the State of Oklahoma should regulate the liquor traffic between other portions of the state and the former Indian Territory; that such traffic could not, under the constitution of the United States, be regulated both by the State of Oklahoma and by the United States; that it was within the power of congress, as was done by the enabling act, to relinquish the regulation of such traffic to the State

of Oklahoma; that since such traffic could not be regulated by both the state and federal governments, the enabling act which provided for the regulation of the traffic by the state must prevail over the act of March 1st, 1895, the enabling act being the later act of congress.

The first question to be determined is to what extent does the scheme of prohibition established by the enabling act cover the same field that was covered by the act of March 1st, 1895. Section 8 of the act of March 1st, 1895 (28 Stat. at L. 697), reads as follows: "That *any person*, whether an Indian or otherwise, who shall in said territory, manufacture, sell, give away, or in any manner, or by any means furnish to anyone, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or *who shall carry or in any manner have carried, into said Territory any such liquors or drinks*, or who shall be interested in such manufacture, sale, giving away, furnishing to anyone, or carrying into said Territory any of such liquors or drinks, shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month nor more than five years."

Tersely stated, this statute regulated commerce in intoxicating liquor with the former Indian Territory, by forbidding the introduction of such liquor from any place outside of the territory.

Section 3 of the Oklahoma enabling act (act of June 16, 1906, ch. 3335, 34 Stat. L. 267) provides: "And said convention [the constitutional convention of the state] shall provide in said constitution * * * "Second. That the manufacture, sale, barter, giving away or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said state, now known as the Indian Territory, and the Osage Indian Reservation, and within any other parts of said state, which existed as Indian Reservations on the first of January, 1906, is prohibited for a period of twenty-one years from the date of the admission of said state into the Union and thereafter, until the people of said state shall otherwise provide by amendment of said constitution and proper state legislation. *Any person,* individual or corporation, who shall manufacture, sell, barter, give away or otherwise furnish any intoxicating liquors of any kind, including beer, ale and wine, contrary to the provisions of this section, or who shall, within the above-described portions of said state, advertise for sale, or solicit the purchase of any such liquors, *or who shall ship, or in any way convey such liquors from other parts of said state into the portions hereinbefore described,* shall be punished, on conviction thereof, by fine not less than fifty dollars and by imprisonment not less than thirty days, for each offense. * * *"

This act of congress in unmistakable language requires the state in its constitution to forbid the introduction of intoxicating liquors of any kind into the former Indian

Territory from other parts of the state. To this extent, the enabling act covers the same field as was covered by the act of March 1, 1895.

In obedience to this requirement of the enabling act, the same was carried into the Constitution of the State of Oklahoma as Section 7 of Article I thereof. This provision of the constitution has been held to be self-executing. *Ex parte* Cain, 20 Okla. 125, 93 Pac. 974.

The next question that arises is, may the state and the United States exercise concurrent jurisdiction and control over the liquor traffic between the old Oklahoma Territory and the former Indian Territory. We submit that they may not—that the constitution of the United States does not permit of state regulation so long as control over such commerce is retained by congress; and that therefore an act of congress expressly providing that the state shall regulate or forbid such commerce must be construed as intended as a relinquishment of congressional control, in the absence of anything in the act indicative of a contrary intent.

We contend that the act of March 1st, 1895, if it were retained in force as a prohibition of commerce in intoxicating liquors between Oklahoma Territory and the former Indian Territory, would clearly be a regulation of commerce with the Indian Tribes. In the United States vs. 43 Gallons of Whiskey, 93 U. S. 188, 23 L. Ed. 846, it is held that an act of congress forbidding the carrying of liquor, not only into country oc-

cupied by the Indians, but also into country adjacent thereto, is an exercise of the power of congress to regulate commerce with the Indian tribes. In Perrin vs. United States, 232 U. S. 478 (a case involving a similar statute), it is said that the power of congress "arises in part from the clause in the constitution investing congress with authority 'to regulate commerce with foreign nations and among the several states and with the Indian tribes' and in part from the recognized relation of tribal Indians to the federal government." And in Joplin Mercantile Company vs. United States, 213 Fed. 926, the Circuit Court of Appeals speaking of the act of March 1st, 1895, said: "Many considerations indicate that the act was passed as a part of the guardianship of the Indians and as a part of the power of congress to regulate commerce with the Indians."

Our position, in support of which we rely solely upon the decisions of the Supreme Court of the United States, is that the power of Congress to regulate commerce with the Indian tribes and its authority arising out of its guardianship of the Indians as an alien but dependent people—to which powers it is said in the Joplin Mercantile case the Act of March 1, 1895, may be ascribed—are, like the power of Congress to regulate commerce among the states and with foreign nations, exclusive powers; that state regulation of these matters is prohibited, at least when Congress has legislated upon the subject; that therefore if it be held that the Act of March 1, 1895, remains in force as a regulation of commerce with the Indian tribes, or as an

exercise of the guardianship of the United States over the Five Civilized Tribes, and, as such, regulates the commerce in intoxicating liquors between the former Indian Territory and other parts of the state, the State of Oklahoma cannot of its own power legislate upon the same subject; that therefore the state legislation passed in obedience to the Enabling Act would be supported not by any authority of the state over a matter of which Congress has retained jurisdiction, but solely by virtue of the delegation of such power by Congress; that Congress cannot delegate its power to regulate such commerce so long as it be considered as commerce with an Indian tribe, nor can it delegate a part of the guardianship or sovereignty of the United States so long as the members of the Five Civilized Tribes be treated by Congress as subject to federal control.

We further contend that the legislation passed under the Enabling Act, resting, as it must, if Congress has retained jurisdiction over the subject, upon congressional permission and not upon any inherent power of the state, and the Act of March 1, 1895, cannot both be enforced, since to do so would result in double jeopardy and in the infliction of double punishments under congressional authority, in violation of the Constitution of the United States. That for these reasons the Enabling Act cannot be sustained as constitutional, nor can the state legislation passed thereunder be upheld, unless it be construed as repealing the Act of March 1, 1895, in so far as the same is repugnant to the Enabling Act, and be treated as a surrender of

the Government's guardianship over the Indians to the same extent. That there is nothing in the Enabling Act inconsistent with this interpretation—nothing in its language that demands a holding that it was intended to operate concurrently with the Act of March 1, 1895—a result which cannot be permitted without doing violence to the Constitution of the United States. The foregoing briefly outlines our contentions on this subject. We shall now refer the court to the decisions relied upon in support thereof.

The Act of March 1, 1895, has been ascribed, as we have said, to the power of Congress to regulate commerce with the Indian tribes and to its guardianship over the Indians. We will discuss, therefore, the question as to the exclusiveness of these powers, and attempt to aid the court in determining whether both Congress and the State may regulate the same commerce with the same Indian tribes at the same time, and whether the same Indians may be subject to two independent guardianships at the same time. If we succeed in convincing the court that either of these powers of Congress is exclusive, our purpose will be accomplished, for if the existence or exercise of either power by Congress excludes state action, it is immaterial whether the other power is exclusive or not. In other words, the scope of an exclusive power of Congress certainly cannot be limited or contracted because some other provision of

the Constitution may also permit the exercise by Congress of the same power. It may be generally stated that,

> "When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the states to the general government." L. S. & M. S. Ry. Co. vs. Ohio ex rel. Lawrence, 173 U. S. 285, 298.

Passing to the specific question as to the exclusiveness of the power of Congress to regulate commerce with the Indian tribes, let us first inquire into the origin and nature of that power. The power of Congress to regulate commerce with foreign nations, and among the several states and with the Indian tribes is granted in the same clause of Article 1, Section 8, of the Constitution of the United States.

In the language of Chief Justice Marshall in Gibbons vs. Ogden, 9 Wheat. 1, 189:

"The words are, 'Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'

"The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, *and parts of na-*

tions, in all its branches, *and is regulated by prescribing rules for carrying on that intercourse.*

* * * * * * * * * *

"The word used in the constitution, then, comprehends, and has always been understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'

"To what commerce does this power extend? The constitution informs us, to commerce 'with foreign nations, and among the several states, *and with the Indian tribes.*'

"It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and *foreign nations.* No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

"If this be the admitted meaning of the word, in its application to foreign nations, *it must carry the same meaning throughout the sentence,* and remain a unit unless there be some plain intelligible cause which alters it."

This language is quoted from the opinion of the great Chief Justice in the leading case of Gibbons vs. Ogden, for the purpose of showing that the power of Congress to regulate commerce with the Indian nations is as broad and complete as is its power to regulate commerce among the several states and with foreign nations. We do this for the reason that a long line of decisions, to some of which the attention of the court will presently be called, establish the exclusive nature of the power of Congress to regu-

late commerce among the several states, while there is comparatively little authority upon the question of the exclusiveness of the power of Congress to regulate commerce with the Indian tribes. However, we are not without authority on this point as well. In the concurring opinion of Mr. Justice Washington in Worchester vs. Georgia, 6 Peters 515, 580, it is said:

"By the constitution, the regulation of commerce among the Indian tribes is given to Congress. This power must be considered as exclusively fixed in congress as the power to regulate commerce with foreign nations, to coin money, to establish postoffices, and to declare war. It is enumerated in the same section and belongs to the same class of powers."

And in the opinion of the court by Mr. Chief Justice Marshall, in the same case (6 Peters 561), it is said:

"The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States."

The decision in this case was that the Cherokee Nation was not subject to the laws of Georgia, and that the law of that state, making it an offense for white persons to reside in the Cherokee Nation without licenses from the governor of the state, was repugnant to the Constitution of the United States.

And in United States vs. 43 Gallons of Whiskey, 93 U. S. 188, 23 L. Ed. 846, that the power of congress to regulate commerce with Indian tribes is an exclusive power, is recognized in the following passages from the opinion of the court: "And congress now has the *exclusive* and unfettered power to regulate commerce with the Indian tribes, a power as broad as that to regulate commerce with foreign nations * * * and as there can be no divided authority on the subject, our duty to a dependent people would require congress to impose further restrictions should country adjacent to Indian reservations be used to carry on the liquor traffic with Indians. * * * It would be strange indeed, in view of this changed condition, if the commercial power, *lodged solely with congress,* and unrestricted as it is by state lines, did not extend to the enactment of a law to exclude spirituous liquors, intended to corrupt the Indians, not only from existing Indian country, but from that which had ceased to be so, by reason of its cession to the United States."

Again, in the case of Bowman vs. Chicago and Northwestern Ry. Co., 125 U. S. 465, 482, although it is said that in respect to commerce among the states, it may be that the same inference is not always to be drawn from the absence of congressional legislation as might be in the case of commerce with foreign nations, the court says:

"The power conferred upon Congress to regulate commerce among the states is indeed contained in the same clause of the Constitution which confers upon it power to

regulate commerce with foreign nations. The grant is conceived in the same terms, and *the two powers are undoubtedly of the same class and character and equally extensive. The actual exercise of its power over either subject is equally and necessarily exclusive of that of the states,* and paramount over all the powers of the states; so that state legislation, however legitimate in its origin or object, when it conflicts with the positive legislation of Congress, or its intention reasonably implied from its silence in respect to the subject of commerce of both kinds, must fail."

We have seen that the powers of Congress to regulate commerce with foreign nations and among the several states and with the Indian tribes are granted by the same clause of the Constitution; are equally extensive; and that each power is equally exclusive of state power on the same subject. The decisions of the Supreme Court of the United States dealing with the question of exclusiveness of power of Congress to regulate commerce, are therefore equally pertinent to this discussion, whether such decisions deal with foreign commerce, with commerce with Indian tribes, or, as most of the decisions in fact do, with interstate commerce.

An examination of these decisions will show that it is conclusively settled that the states may not directly and substantially regulate interstate commerce, even in the absence of congressional regulation; that as to certain local matters incidentally affecting interstate commerce, the states may legislate until Congress enters the field; but that even as to such local and incidental matters, state legislation is superseded by congressional legislation on the sub-

ject, even if not inconsistent therewith. With this limitation the power of Congress is absolutely exclusive. So far as the case at bar is concerned, these distinctions are unimportant; fiirst, because this prosecution is necessarily based on the theory that Congress has in fact legislated on the subject; and, second, because the state law does not merely indirectly and incidentally affect commerce in intoxicating liquors with the Indian tribes—it positively forbids the same. Enacted in obedience to the express command of the Oklahoma Enabling Act, this state law professedly regulates the same commerce which the Circuit Court of Appeals has held is regulated by the Act of Congress of March 1, 1895. We submit that this cannot be done. If the Enabling Act contemplates such a dual regulation of commerce with the Indian tribes, it must be held to be unconstitutional. On the other hand, if it does not contemplate such a result, it can only mean what it expressly says, viz., that the state shall regulate this commerce. (By this it is not meant that Congress may delegate to the states its power to regulate commerce. As we shall presently show, the Enabling Act must be sustained as a surrender to the state of jurisdiction over its own citizens, who have been thereby declared by Congress no longer to be members of Indian tribes—so far as commerce in intoxicating liquors is concerned.)

Much of the law on the question under consideration is to be found in the cases of Bowman vs. Chicago & N. W.

Ry. Co., 125 U. S. 465, and Leisy vs. Hardin, 135 U. S. 100. The first of these cases was an action brought by Bowman against the railroad company in the Circuit Court of the United States for the Northern district of Illinois for the recovery of damages, resulting from the refusal of the railway company to carry into the State of Iowa certain intoxicating liquors tendered by Bowman for shipment to himself in Iowa. The railroad company filed a plea to the plaintiff's declaration, setting up as a defense Section 1553 of the Iowa Code, forbidding any common carrier to bring within the State of Iowa for any person or persons or corporation, any intoxicating liquors from any other state or territory of the United States, without first having been furnished with a certificate, under the seal of the county auditor of the county to which said liquor was to be transported, or was consigned for transportation, certifying that the consignee or person to whom said liquor was to be transported, conveyed, or delivered, was authorized to sell intoxicating liquors in such county. Bowman had been refused such a certificate. The defendant's plea was sustained by the trial court, but its judgment was reversed by the Supreme Court of the United States. The Supreme Court held that the power of Congress to regulate interstate commerce is exclusive; that by its silence, Congress had indicated its intent that interstate commerce in intoxicating liquors should be free, and that the state law was therefore unconstitutional, its effect being to regulate interstate commerce, even though such was not its purpose.

In the opinion of the court, delivered by Mr. Justice Matthews, will be found much that is pertinent to this discussion. It is recognized in this opinion that the express purpose of the Iowa statute was not to regulate commerce, but to protect the peace and good order of the state, the health and morals of its inhabitants, and that the question was presented whether or not a state statute passed in the exercise of the police power might be upheld when its effect was to regulate interstate commerce. At page 475 of the opinion it is said:

"It thus appears that the provisions of the statute set out in the plea, prohibiting the transportation by a common carrier of intoxicating liquor from a point within any other state for delivery at a place within the State of Iowa, is intended to more effectually carry out the general policy of the law of that state with respect to the suppression of the illegal manufacture and sale of intoxicating liquor within the state as a nuisance. *It may, therefore, fairly be said that the provision in question has been adopted by the State of Iowa, not expressly for the purpose of regulating commerce between its citizens and those of other states, but as subservient to the general design of protecting the health and morals of its people, and the peace and good order of the state, against the physical and moral evils resulting from the unrestricted manufacture and sale within the state of intoxicating liquors.*"

It was held, however, that it was immaterial what reserved power of the state might otherwise have justified the enactment of the Iowa statute if its necessary effect was to regulate interstate commerce. The prior decisions of the Supreme Court are reviewed in the opinion in support of

this conclusion. We deem quotations from the authorities on this point to be unnecessary, since it is well settled that in passing upon the validity of state statutes attempting to regulate interstate commerce, it is unimportant what particular reserved power of the state such statutes are enacted under.

And as to the provision of the Oklahoma Enabling Act here in question and the state legislation enacted in pursuance thereof, it is clear that the same relate solely to the regulation of *commerce* in intoxicating liquors, and if such commerce be held to be commerce with Indian tribes, then clearly they constitute a regulation thereof.

It is shown by the court in Bowman vs. C. & N. W. Ry. Co., *supra,* that the power to regulate commerce includes the power to determine what may be admitted as well as what may be excluded from such commerce, and it is pointed out that if the State of Iowa may forbid the transportation from other states of intoxicating liquors, which are legitimate articles of commerce until otherwise so determined by Congress, it may exclude other articles of commerce and forbid such interstate commerce entirely.

Following the decision in the Bowman case it was held by the Supreme Court of the United States in Leisy vs. Hardin, 135 U. S. 100, that the right of transportation of an article of commerce from one state to another includes the right of the consignee to sell it in unbroken packages at the place of termination of transportation, and that a law of

the State of Iowa undertaking to forbid the sale in the original package of intoxicating liquors imported from another state was repugnant to the commerce clause of the Federal Constitution. Discussing the question of the exclusiveness of the power of Congress to regulate interstate commerce, Mr. Chief Justice Fuller, speaking for the court, uses the following language:

"The doctrine now firmly established is, as stated by Mr. Justice Field, in Bowman vs. Chicago & N. W. R. Co., 125 U. S. 507, 'that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers and docks, and the like, which can be properly regulated only by special provisions adopted to their localities, the state can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted. It is only after the importation is completed, and the property imported is mingled with and becomes a part of the general property of the state, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled.'

"The conclusion follows that, as the grant of the power to regulate commerce among the states, so far as one system is required, is exclusive, the states cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end."

The Chief Justice here refers to many of the decisions of the Supreme Court of the United States, illustrating what are and what are not considered as state regulations affecting interstate commerce within the rule. The case at bar, however, is not a case falling near the line, and it is unnecessary to draw any fine distinctions. The state legislation, passed in obedience to the Enabling Act, clearly regulates, because it absolutely prohibits, commerce in intoxicating liquors between other parts of the State of Oklahoma and the former Indian Territory. At page 122, the Chief Justice, continuing this discussion, says:

"Whenever the law of the state amounts essentially to a regulation of commerce with foreign nations, or among the states, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one state and another, or another country and this, it comes in conflict with power which, in this particular, has been exclusively vested in the general government, and is therefore void."

It will be noted that while in this decision the power of Congress under the commerce clause of the Federal Constitution is held to be an exclusive power, such qualifications as that "the states cannot exercise that power without the assent of Congress," appear in the language of the court.

In the later case of Re Rahrer, 140 U. S. 545, the Act of Congress, commonly known as the Wilson Act, came before the Supreme Court of the United States on the question of its constitutionality. This law was attacked on the ground that it was an attempted delegation by Congress to the states of the power of Congress to regulate interstate commerce in intoxicating liquors. The questions were thus squarely presented of the power of Congress to delegate the regulation of such commerce to the states and whether or not the Wilson act constituted a delegation of such powers. The law was sustained on the ground that it did not delegate to the states the power to regulate such commerce, but it will be noted that under the Wilson Act, state power does not attach until Federal power ends. Mr. Chief Justice Fuller again delivered the opinion of the Court, saying in part:

"Nor can Congress transfer legislative powers to a state nor sanction a state law in violation of the Constitution; and if it can adopt a state law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power. Cooley vs. Board of Wardens, 52 U. S., 12 How. 299; Gunn vs. Barry, 82 U. S., 15 Wall. 610, 623; U. S. vs. DeWitt, 76 U. S., 9 Wall. 41.

"It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a state."

It is true that in the cases heretofore noticed the state legislation has attempted to regulate commerce in cases

where Congress has, either positively or by implication from its silence, declared that commerce should be free and unrestricted. But it is settled by the later decisions of the Supreme Court of the United States that, regardless of whether the subject is within the exclusive power of Congress or is one upon which the states may legislate until Congress acts, and regardless of whether such state legislation is repugnant to the congressional legislation or not, when Congress passes a law regulating interstate commerce, all state legislation relating thereto is superseded.

In C. R. I. & P. Ry. Co. vs. Hardwick Farmers' Elevator Co., 226 U. S. 426, 435, Mr. Chief Justice White, speaking for the court, says:

"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulations even if such subject was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow, in consequence of the action of Congress to which we have referred, that the power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority *over the subject.* We say this because *the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme.* It results, therefore, that in a case where, from the particular nature of certain subjects, the state may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so, *action by Congress destroys the possibility of such assumption, since such action when exerted covers the whole field,*

and renders the state impotent to deal with a subject over which it had no inherent, but only permissive power. Southern R. Co. vs. Reid, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. Rep. 140."

In the case of N. Y. C. & H. R. R. Co. vs. Board of Chosen Freeholders, 227 U. S. 248, it was held that the inclusion of railroad ferries in the Act of Congress of February 4, 1887, as one of the subjects regulated by that statute, is such an extension of the Federal authority over the operation by a railway company of a ferry upon a navigable river forming the boundary between two states as to invalidate any regulation under state authority of the rates to be charged by such company for the interstate ferriage of persons, although such regulation relates only to persons other than railroad passengers. Speaking for the court, Mr. Chief Justice White says:

"We think the argument by which it is sought to limit the operation of the Act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from state to state is wanting in merit. In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject as to which the purpose of Congress to take control was manifested. Indeed, this conclusion is inevitable since the assumption of a purpose on the part of Congress to divide its authority over the elements of interstate commerce intermingled in the movement of the regulated interstate ferriage would be to render the national authority inefficacious by the confusion and conflict which would result. *The conception of*

the operation at one and the same time of both the power of Congress and the power of the states over a matter of interstate commerce is inconceivable, since the exertion of the greater power necessarily takes possession of the field, and leaves nothing upon which the lesser power may operate. To concede that the right of a state to regulate interstate ferriage exists 'only in the absence of Federal legislation,' and at the same time to assert that the state and Federal power over such subject is concurrent, is a contradiction in terms. But this view has been so often applied as to cause the subject to be no longer open to controversy. Chicago, R. I. & P. Ry. Co. vs. Hardwick Farmers' Elevator Co., decided January 6, 1913."

In the case of Re Heff, 197 U. S. 488, it was held that there can be no divided authority over the subject of the sale of intoxicating liquors by or to Indians. The effect of this decision is that so long as the government's guardianship continues, it is exclusive of state authority, but that when its guardianship is relinquished by Congress, the state authority becomes exclusive. In that case the Supreme Court released upon *habeas corpus* a person convicted of selling intoxicating liquors to an Indian, who had ceased to be subject to the guardianship of the United States. We quote from the opinion of the court by Mr. Justice Brewer:

"We do not doubt that the construction placed by these several courts upon this section is correct, and that John Butler, at the time the defendant sold him the liquor, was a citizen of the United States and of the State of Kansas, having the benefit of, and being subject to, the laws,

both civil and criminal, of that state. Under these circumstances, could the conviction of the petitioner in the Federal court of a violation of the Act of Congress of January 30, 1897, be sustained? In this Republic there is a dual system of government, national and state. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers its possesses, and preventing any trespass thereon by the other. The general police power is reserved to the states, subject, however, to the limitation that in its exercise the state may not trespass upon the rights and powers vested in the general government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And so far as it is an exercise of the police power it is within the domain of state jurisdiction. It is true the national government exacts licenses as a condition of the sale of intoxicating liquors, but that is solely for the purposes of revenue, and is no attempted exercise of the police power. A license from the United States does not give the licensee authority to sell liquor in a state whose laws forbid its sale, and neither does a license from a state to sell liquor enable the licensee to sell without paying the tax and obtaining the license required by the Federal statute. License Cases, 5 How. 504, 12 L. Ed. 256; McGuire vs. Massachusetts, 3 Wall. 387, 18 L. Ed. 497. Now the act of 1897 is not a revenue statute, but plainly a police regulation. It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a state to another within the territorial limits of that state would be an invasion of the state's jurisdiction, and could not be sustained; and it would be immaterial what the antecedent status of either buyer or seller was. *There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the state or the nation, and not divided between the two.*

"In Kansas Indians, 5 Wall. 737 (Blue Jacket vs. Johnson County), 18 L. Ed. 667, the question was whether lands of Shawnee Indians held in severalty were subject to state taxation, and it was held that they were not, although in the last treaty with the Shawnees, the one authorizing the allotments, there was no express stipulation for exemption from taxation. The court said:

"'If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing then they are a "people distinct from others," capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. *If under the control of Congress, from necessity there can be no divided authority.* If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress. It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas; "but, until they are clothed with the rights and bound to all the duties of citizens," they enjoy the privileges of total immunity from state taxation.'

"If it be true that there can be no divided authority over the property of the Indian, *a fortiori* must it be true as to his political status and rights.

"*Subjection to both state and national law in the same matter might often be impossible.* The power to punish a sale to an Indian implies an equal power to punish a sale by an Indian. If by national law a sale to or by an Indian was punished solely by imprisonment and by state law solely by fine, how could both laws be enforced in respect to the same sale? The question is not whether a particular right may be enforced in either a court of the state or one of the nation, but whether two sovereignties can create independent duties and compel obedience. In United States vs.

Dewitt, 9 Wall. 41, 19 L. Ed. 593, the question was whether the 29th section of the internal revenue act of March 2, 1867 (14 Stat. at L. 484, chap. 169), which established a police regulation in respect to the mixing for sale, or the selling, of naptha and illuminating oils, was enforceable within the limits of a state, and it was held that it was not, the court saying:

"'As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially, all state legislation, as, for example, in the District of Columbia. Within state limits it can have no constitutional operation.'

"Re Now-Ge-Zhuck, 76 Pac. 877, decided by the Supreme Court of Kansas, referred to an allottee under the act of February 8, 1887, and in respect to the power of the state to enforce its laws over such allottee that court said:

"'An Indian upon whom has been conferred citizenship and who enjoys the protection of the laws of the state, should be punished for a transgression of them. This we are to presume Congress contemplated. It being shown by the agreed facts that petitioner was an allottee to whom a patent had been issued, and further shown that the allotments had been made and completed as provided by the act of February 8, 1887, the laws of the state were operative, and the state had jurisdiction to arrest and punish petitioner for the offense by him committed.'

"It is true the same act may often be a violation of both the state and Federal law, *but it is only when those laws occupy different planes.* Thus, a sale of liquor may be a violation of both the state and Federal law, in that it was made by one who had not paid the revenue tax and received from the United States a license to sell, and also had not complied with the state law in reference to the matter of

state license. But in that case the two laws occupy different planes--one that of revenue and the other that of police regulation. There is no suggestion in the present case of a violation of the internal revenue law of the nation, but the conviction is sought to be upheld under the act of 1897, a mere statute of police regulation.

"But it is contended that, although the United States may not punish under the police power the sale of liquor within a state by one citizen to another, it has power to punish such sale if the purchaser is an Indian. And the power to do this is traced to that clause of Sec. 8, Art. 1 of the Constitution which empowers Congress 'to regulate commerce with foreign nations, and among the several states and with the Indian tribes.'

"It is said that commerce with the Indian tribes includes commerce with the members thereof, and Congress, having power to regulate commerce between the white men and the Indians, continues to retain that power, although it has provided that the Indian shall have the benefit of and be subject to the civil and criminal laws of the state, and shall be a citizen of the United States, and therefore a citizen of the state. But the logic of this argument implies that the United States can never release itself from the obligations of guardianship; that, so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national, and therefore state, citizenship, the benefits and burdens of the laws of the state, may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the state, and release him from obligations of obedience thereto. Can it be that because one has Indian, and only Indian, blood in his veins, *he is to be forever one of a special class over whom the general government may, in its discretion, assume the rights of guardianship which it has once abandoned, and this*

whether the state or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound. * * *

"But it is unnecessary to pursue this discussion further. We are of the opinion that, when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of, *and requires him to be subject to, the laws,* both civil and criminal, *of the state,* it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created cannot be set aside at the instance of the government without the consent of the individual Indian and the state, and that this emancipation from the Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property.

"The district court of Kansas did not have jurisdiction of the offense charged, and therefore the petitioner is entitled to his discharge from imprisonment."

We have seen that the power of Congress under the commerce clause of the Federal Constitution excludes the power of the states to regulate the commerce therein mentioned; and that even as to incidental matters remotely connected with such commerce, state legislation is superseded when Congress acts upon the subject, although there may be no conflict between the congressional and state legislation. We have seen that when the state legislates in the absence of congressional legislation, it does so, not of its own inherent power, but under what Mr. Chief Justice White terms "permissive power," which Congress has suf-

fered it to exercise. We take it to be settled by the decision in Re Rahrer, *supra,* that, whatever Congress may suffer the state to do in legislating upon matters remotely and incidentally affecting interstate commerce, it cannot delegate to a state the power to regulate commerce among the several states or with the Indian tribes. A moment's reflection is all that is necessary to a recognition of the fact that this rule must apply with special force to a case where it is sought to uphold congressional legislation regulating Indian commerce *under criminal penalties,* and at the same time to uphold state regulation of the same commerce under like criminal penalties. The power of Congress being exclusive and the state being wholly without authority to legislate upon the subject of its own inherent power, the only possible power it can have on the subject must necessarily come from Congress. In other words, both penalties would be inflicted under the authority of the government of the United States. It is manifest that unless both such penal statutes can be enforced, the state statute must be declared to be unenforcible in any case. But the decision of the Supreme Court of the United States in Grafton vs. U. S., 206 U. S. 333, settles this question. The Fifth Amendment to the Constitution of the United States is construed as forbidding more than one prosecution for the same criminal act *under the authority of the United States.* It was there held that a trial by court-martial, exercising authority under the United States, barred a second prosecution for the same offense in a court of the Philippine Islands, likewise deriving

its authority from the United States. In the opinion of the court by Mr. Justice Harlan, at page 354, it is said:

"The same act, as held in Moore's Case, may constitute two offenses, one against the United States, and the other against a state. *But these things cannot be predicated of the relations between the United States and the Philippines. The government of a state does not derive its powers from the United States, while the government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all of their powers by authority of the United States.* The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount. So that the cases holding that the same acts committed in a state of the Union may constitute an offense against the United States and also a distinct offense against the state do not apply here, where the two tribunals that tried the accused *exert all their powers under and by authority of the same government—that of the United States.*"

Under the foregoing decisions we submit that it can not be held that commerce in intoxicating liquors between other parts of the State of Oklahoma and the former Indian Territory can be regulated at the same time by Federal and state legislation, each forbidding such commerce under penal statutes. If the Five Civilized Tribes be held still to be Indian tribes within the commerce clause of the Federal Constitution, and hence that it is within the power of Congress to regulate commerce in intoxicating liquors with them on the ground that the same is commerce with an Indian tribes, then certainly they must be held to be Indian tribes for the purpose of excluding the power of the State of Okla-

homa to regulate the same commerce. If the power of Congress to regulate commerce with the Indian tribes goes to the full extent of sustaining legislation forbidding the introduction of intoxicating liquor into the territory occupied by the Five Civilized Tribes (comprising all of what was formerly the Indian Territory), then the power is exclusive *to the same extent.* On the other hand, if the power to regulate commerce with the Indian tribes does not justify Congress in regulating all commerce in intoxicating liquors with the former Indian Territory, the Act of 1895 must be held to be beyond the power of Congress.

As is stated by the Circuit Court of Appeals in the Joplin Mercantile Co. case, the state has the power to repeal the legislation enacted in pursuance of the Enabling Act, and if the state has the inherent power, notwithstanding the regulation of such commerce by Congress, to forbid the introduction of intoxicating liquors into the former Indian Territory, it must also have the inherent power if it sees fit to authorize such commerce. If the state now has the inherent power to forbid commerce in intoxicating liquors with the former Indian Territory, that power must continue, even if Congress should change its policy with reference to such commerce and conclude that the interest of the members of the Indian tribes demand that commerce in intoxicating liquors for medicinal or other purposes shall be free. We believe that these considerations demonstrate that there can be no divided sovereignty over this commerce, and no concurrent regulation thereof, and that the members of the

Five Civilized Tribes cannot be held to be the wards of the government, and citizens of the state, subject to its laws, with reference to the same commerce at one and the same time. If we are correct in this position, it necessarily follows that the decision of the Circuit Court of Appeals in the Joplin Mercantile Co. case and the provision of the Enabling Act requiring the state to regulate the commerce in intoxicating liquors between other parts of the state and the former Indian Territory cannot both stand. This being so, let us inquire if there is any ground for holding the provision of the Enabling Act to be invalid? We submit that there is none. As we have said it is an unquestioned rule of statutory construction that if a statute be susceptible of two or more constructions, one of which will render it constitutional and the other unconstitutional, the former construction must be preferred. But there is nothing in the Enabling Act from which an intention can be inferred that Congress intended to require the state to regulate this commerce, and at the same time to regulate the same itself. In fact, the conclusion reached by the Circuit Court of Appeals in the Joplin Mercantile Company case, that the Act of March 1st, 1895, remains in force as a regulation of commerce with the Indian Tribes, notwithstanding the passage of the Enabling Act, was based not upon any express provision of the Enabling Act to that effect, but upon the ground that there was nothing on the face of the Enabling Act which indicated an intent to repeal the Act of March 1, 1895, as to intrastate commerce. But certainly an act of

Congress, which it is within the unquestioned power of that body to pass, cannot be held to be unconstitutional, because it and an earlier act of Congress cannot both be enforced consistently with the Constitution. If there is any constitutional objection to the enforcement of both acts, then clearly it is the later act which must be enforced.

We have said that it was within the unquestioned power of Congress to pass this provision of the Enabling Act, and we take it that no extended discussion of this power of Congress is necessary. It is true that Congress cannot delegate to the state its power to regulate commerce with the Indian tribes. It is equally clear that it is within the power of Congress to determine when the tribal relations and guardianship of Indians shall cease, and the Enabling Act does nothing more than to declare the termination of the tribal relationship and of the guardianship of the Indians, at least as to commerce between them and the citizens of other portions of the state, leaving the state to regulate the same by means of the legislation which the Enabling Act required it to enact on the subject. In support of this contention as to the purpose and effect of the Enabling Act—if support be necessary—we refer the Court to the foregoing quotation from the opinion of Mr. Justice Brewer in the case of Re Heff, and to the following from Tiger vs. Western Investment Co., 221 U. S. 286, 315: "Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long established policy of the government, has a right to determine

for itself when the guardianship which has been maintained over the Indian, shall cease." We submit that it is clear that the Act of 1895 is no longer in force as a regulation of commerce in intoxicating liquors between the former Oklahoma Territory and the former Indian Territory.

II.

The Act of March 1st, 1895, having been superseded as to intrastate transactions by the Enabling Act, it is beyond the power of Congress to continue the former Act in force as to interstate transactions. It cannot be sustained as an exercise of the power of Congress to regulate interstate commerce, because it discriminates against the ports of the State of Oklahoma, by forbidding transportation of liquor into Oklahoma from other states, while permitting the unrestricted transportation of liquor into the other states of the Union. It cannot be sustained as an exercise of the power of Congress to regulate commerce with the Indian Tribes, because it gives a preference to the ports of the State of Oklahoma by permitting that state to regulate for itself the commerce in intoxicating liquors between the people of other parts of the state and the former Indian Territory, while denying to the people of all the other states the right to engage in such commerce under penalty of fine and imprisonment.

We have seen that the Constitution of the United States does not permit of the concurrent regulation, by state and nation, of commerce in intoxicating liquors between the former Oklahoma Territory and the former Indian Territory; and hence, that it must be held that the act of March 1st, 1895, was superseded as to intrastate commerce by the

enabling act (the last act of congress on the subject), which required the state to assume the regulation of such commerce.

It follows that if the act of March 1st, 1895, is to remain in force at all, it can be only as a prohibition against the introduction of intoxicating liquors into the former Indian Territory from without the State of Oklahoma. We submit that this may not be done, under Const. U. S., Art. 1, Sec. 9, forbidding the giving of a perference by any regulation of commerce to the ports of one state over those of another.

We are aware that in *Ex parte* Webb, 225 U. S. 663, 56 L. Ed. 1248, it was declared to be within the power of congress to retain the act of March 1st, 1895, in force, as a prohibition against the introduction of intoxicating liquors into the former Indian Territory from without the state. This declaration was made, however, in answer to the contention that the retention of said act in force was inconsistent with the equality of statehood, secured to the State of Oklahoma by Section 3 of Article IV of the Constitution of the United States.

The question of the validity of the act under that provision of the constitution forbidding congress, by any regulation of commerce, to give a preference to the ports of one state over those of another, was not presented or considered. Hence, we feel that our contention that the act is repugnant to the latter provision of the constitution is

not foreclosed. While it is true that some of the language of the opinion in *Ex parte* Webb might be construed as declaring that the act is impervious to attack on constitutional grounds, "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." Cohens vs. Virginia, 6 Wheat. 264, 399, 5 L. Ed. 257, 290.

The decision in the Webb case could, of course, settle nothing except the questions actually decided. As said by Mr. Justice Field, speaking for the Supreme Court in Boyd vs. Alabama, 94 U. S. 645, 24 L. Ed. 302: "Courts seldom undertake, in any case, to pass upon the validity of legislation, where the question is not made by the parties. Their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then, they will construe the acts presented for consideration, define their meaning, and enforce their provisions. The fact that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity, when that question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases, nor conclude the court upon the constitutionality of the acts because that

point might have been raised and determined in the first instance.

"So when, in the present case, the point was taken for the first time against the constitutionality of the Act of 1868, the court was not precluded by the previous decisions from freely considering and determining it."

Obviously, if the courts will not consider an objection to the constitutionality of an act not made by a litigant, a constitutional objection can no more be foreclosed by a decision upholding an act as against an attack under another provision of the constitution than by a decision merely construing and enforcing the statute.

While the act of March 1st, 1895, regulates interstate commerce, the fact that it is claimed also to regulate commerce with Indian Tribes must not be overlooked. It is clear, however, that it is *a regulation of commerce.* As said by the Supreme Court in United States vs. Holliday, 3 Wall. 407, 416, 18 L. Ed. 182, 185, "The act in question, although it may partake of some of the qualities of those acts passed by state legislatures, which have been referred to the police powers of the states, is, we think, still more clearly entitled to be called a regulation of commerce." See also United States vs. 43 Gallons of Whiskey, 93 U. S. 188, 23 L. Ed. 846.

Being a regulation of commerce, the next question that arises is: Is it repugnant to the provision of the constitution (Article 1, Section 9) that "No preference shall be given by any regulation of commerce or revenue, to the

ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another."

It will be noted that this constitutional provision speaks of *any* regulation of commerce. It is not confined to interstate commerce, to commerce with foreign nations, or to commerce with the Indian tribes. The scope of this provision is as broad as the grant to congress of authority to regulate commerce among the states, with foreign nations, and with the Indian tribes. It extends to all commerce which congress has authority to regulate, and to any regulation thereof. Its purpose, as we shall undertake to show, is to insure absolute commercial equality between the several states of the Union.

It will be noted that this constitutional provision forbids the giving of preferences to the "ports" of one state over those of another. A narrow, literal interpretation of this language might seem to limit this guaranty of the constitution to commerce by sea. Such an interpretation cannot be given to it, however, without destroying its efficacy, and withdrawing from its protection most of the commerce which it was intended to protect. We contend that the term "ports," as used in this provision of the constitution, is merely a figure of speech, as is the language of the Fifth Amendment, "nor shall any person be subject for the same offense to be twice put in jeopardy of *life or limb*," and the reference in statutes of limitations to "absence

beyond seas," which is construed as meaning nothing more than absence from the state. Murray's Lessee vs. Baker, 3 Wheat. 541, 4 L. Ed. 454; Shelby vs. Guy, 11 Wheat. 361, 6 L. Ed. 495; The Bank of Alexandria vs. Dyer, 14 Peters 141, 10 L. Ed. 391.

In Murray's Lessee vs. Baker, *supra*, which originated in the Circuit Court for the District of Georgia, Mr. Justice Johnson, speaking for the court, said:

"The defense set up is the act of limitations of the State of Georgia. The only question which the case presents is, whether the plaintiff, who resided in Virginia, comes within the exception in the act in favor of persons 'beyond seas.' On this question the court are unanimously of opinion that to give a sensible construction to that act, the words 'beyond seas' must be held to be equivalent to 'without the limits of the state,' and order this opinion to be certified to the Circuit Court for the District of Georgia."

And in Shelby vs. Guy, *supra*, it is said by the court:

"It is true that the words 'beyond seas,' considered abstractedly, must, in every state in this Union, mean something more than 'without the limits of the commonwealth,' which words the State of Virginia has very properly added to the statute of James. But it is also true, that if the words 'beyond seas' be considered with reference to the insular situation of the country from which we adopted the law, they mean exactly the same as the words superadded in the Virginia law. And it was this consideration, as well as the obvious absurdity of applying the terms, 'beyond seas,' in their literal significations, that induced this court, and has induced so many state courts, to give it the meaning of beyond the commonwealth."

When it is remembered that at the time of the adoption of the Constitution, the commerce of this country was carried on almost entirely by water, the applicability of the decisions from which we have quoted to the case at bar is apparent. In *In re* Debbs, 158 U. S. 564, 590, 39 L. Ed. 1092, 1105, Mr. Justice Brewer, delivering the opinion of the court, says:

"Up to a recent date, commerce, both interstate and international, was chiefly by water, and it is not strange that both the legislation of congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come to be carried on mainly by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision or abridged the power of congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so it is with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

See also Pensacola Telegraph Company vs. Western Union Telegraph Company, 96 U. S. 1, 9, 24 L. Ed. 708, 710.

In "Commerce Clause of the Federal Constitution," by Prentice and Egan, at p. 306, speaking of this constitutional provision, it is said:

"At the time of the adoption of the Constitution, navigation was the only means of conducting commerce on a large scale. Regulation of navigation and the imposition of a tariff were the principal commercial regulations contemplated by the convention, and it may well be that in securing equal rights of navigation for all the states, it was considered that the field of federal commercial regulation was practically covered by a provision which required uniform regulation in all national matters. It is probable that the construction which will be given to the clause will be in accordance with this broad purpose. Freedom of transportation from conflicting, discriminating and burdensome restrictions was the purpose of the Constitution; and while the language employed was almost necessarily such as referred to the means of transportation then in existence and within the knowledge of the convention, nevertheless the operation of the Constitution is not confined to the instrumentalities of commerce then known, but keeps pace with the progress of the country, and is adapted to new developments of time and circumstance.

"Within a hundred years the means of transportation has so changed that the commerce among the states conducted by land is more important than that conducted by water. Provisions of the Constitution which at first were applied only to navigation may therefore now be applied to railways, as in the case of the clause which forbids

the states from laying any duty of tonnage, and the same view may also be taken of the preference clause."

This provision of the Constitution has not, so far as we are aware, been authoritatively construed by the courts. All of the *dicta,* however, that we have been able to find point to a construction in harmony with its manifest intent and purpose to secure equality between the states in the regulation of commerce, regardless of whether that commerce be conducted by means of water or not. In Pennsylvania vs. The Wheeling and Belmont Bridge Company, 18 How. 421, 15 L. Ed. 435, Mr. Justice Nelson, speaking of Article 1, Section 9 of the Constitution, said that:

"The truth seems to be that, what is forbidden is not discrimination between individual ports within the same or different states, but discrimination between states."

The purpose of this constitutional provision was stated in the dissenting opinion of Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Peckham, in Dooley vs. United States, 183 U. S., at p. 168, 46 L. Ed. 136, as follows:

" 'No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.'

"These provisions were intended to prevent the application of the power to lay taxes or duties, or the power to regulate commerce, so as to discriminate between one part of the country and another."

This declaration is in no wise opposed to anything contained in the opinion of the court. In fact, Mr. Justice White in his concurring opinion, in which he undertakes "to summarize in my own language the reasoning which the opinion embodies as it is by me understood," says, at p. 166 (L. Ed., p. 135):

"Of course, the Constitution contemplates freedom of commerce between the states, but it also confers upon congress the powers of taxation to which I have referred, and safeguarded the freedom of commerce and equality of taxation between the states by conferring upon congress the power to regulate such commerce, by providing for the apportionment of direct taxes, by exacting uniformity throughout the United States in the laying of duties, imposts and excises, and by prohibiting preferences between ports of different states."

When it is borne in mind that the power of congress to regulate commerce was conferred for the purpose of securing uniformity and preventing discriminating and unequal state legislation, it is clear that the spirit and intent of the constitutional provision forbidding the giving of preferences to the ports of one state over those of another, extend to all regulations of commerce by land, as well as by sea.

If this provision of the Constitution forbids preferences in the regulation of commerce on land, we submit that there can be no question of the invalidity of the act of March 1st, 1895, thereunder.

Treated as a regulation of commerce with the Indian

tribes, that act most clearly gives a preference to the State of Oklahoma by permitting commerce in intoxicating liquors to be carried on between other portions of the State of Oklahoma and the former Indian Territory, while it denies to the people of the other states of the Union the right to engage in such commerce under pain of criminal prosecutions for so doing.

It is true that in the enabling act, congress has required the State of Oklahoma to forbid commerce in intoxicating liquors between the former Oklahoma Territory and the former Indian Territory. But, as we have seen, the enabling act was a complete renunciation of federal control over such commerce, and, in the language of Mr. Justice Brewer in *In re* Heff, *supra,* "The emancipation from federal control, thus created, cannot be set aside at the instance of the government, without the consent of the individual Indian and of the state."

As we have already seen, since both the state and nation cannot regulate this commerce, the effect of the enabling act was to remit to the state the power to regulate it, which power to regulate includes, of course, the power to permit, as well as the power to forbid. Further discussion of this phase of the question is unnecessary. It is clear that it cannot be said that a preference is not given by a regulation of commerce by congress which forbids such commerce to the people of part of the states, while leaving

it to other states to regulate for themselves the conduct of such commerce by their own citizens.

The repugnancy of the act to the clause of the Constitution under consideration is equally apparent if the act be treated as a regulation of interstate commerce. As a regulation of interstate commerce, it discriminates against the State of Oklahoma, in that it forbids the introduction of intoxicating liquors from other states into a large part (approximately one-half) of the State of Oklahoma, whereas neither this act nor any other act of congress makes criminal, or even forbids, interstate commerce in intoxicating liquors with any other states than Oklahoma.

For the foregoing reasons it is most respectfully urged that the act of March 1st, 1895, cannot be sustained. It is most clearly a regulation of commerce, interstate, as well as with Indian tribes, and is therefore repugnant to the Constitution, in that in one respect it prefers the ports of the State of Oklahoma to those of the other states, and in another, discriminates against the State of Oklahoma in favor of the other states of the Union.

In the ordinary case, it is necessary in holding an act unconstitutional, to impute to congress an act in excess of its powers under the Constitution of the United States. In the case at bar, however, no such excess of authority need be imputed. Congress passed the act of March 1st, 1895, as an entirety, forbidding commerce in intoxicating liquors with the Indian Territory to all persons

within the jurisdiction of congress—to the people of Oklahoma Territory, as well as to the people of the States. At the time of its passage, the act was justified, not only as a regulation of commerce with the Indian tribes, but as an exercise of jurisdiction over territory within the exclusive jurisdiction of the United States. The act is now unconstitutional, not by reason of the want of power in congress to pass it, but because of the changed conditions growing out of the admission of Oklahoma as a state, under an enabling act which is inconsistent with its continuance in force.

It may be added that the holding for which we contend will not leave the Indians of Oklahoma without adequate protection. The Act of January 30, 1897 (29 Stat. L. 506), forbidding the sale of liquor to Indians as well as the introduction of liquor into the Indian country remains in force in Oklahoma with the same force and effect as elsewhere in the United States, and in addition thereto, the constitution of Oklahoma (Art. 1, Sec. 7), forbids the introduction of liquor into the former Indian Territory, as required by the Enabling Act.

CONCLUSION

In conclusion it is most respectfully submitted that the Enabling Act may be reasonably construed as intended to repeal the Act of March 1, 1895, in so far as that act applied to intrastate commerce in intoxicating liquors, and that the Enabling Act cannot be otherwise construed without raising the gravest of constitutional questions. If the Enabling Act be construed as contemplating concurrent regulation of this intrastate commerce by the State and Nation, the question of the power of Congress to accomplish such a result at once arises—a question which, we submit, must be answered in the negative. Because it is not within the power of Congress to authorize the concurrent control of such commerce, and because it has indicated no intent to do so, it is submitted that the Enabling Act must be construed as relinquishing to the state the undivided and exclusive control over commerce in intoxicating liquors between other parts of the State of Oklahoma and the former Indian Territory.

The remaining question as to the power of Congress to retain the Act of March 1, 1895, in force as a prohibition against the introduction of liquor into the former Indian Territory from other states is obviously one of far reaching importance. The question involved is not merely one of the power of Congress to give preferences to or to discriminate against the people of one or more of the states in regulating commerce in intoxicating liquors with the Indian Tribes. The constitutional provision, the protection

of which we have invoked, refers to all commerce—interstate, and with foreign nations, as well as with the Indian tribes—it applies to all articles of commerce as well as to intoxicating liquors. The necessity of submitting this brief before the argument of the case at bar has compelled us to give to this last question less consideration than its importance demands. We hope, however, that if the court deems it essential to determine this question in disposing of the case at bar, this brief may in some degree aid in its solution.

Respectfully submitted,

E. G. McAdams,
Norman R. Haskell,
C. B. Stuart,
A. C. Cruce,
M. K. Cruce,

Amici Curiae.

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AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

JOPLIN MERCANTILE COMPANY AND JOSEPH Filler, petitioners,
v.
THE UNITED STATES.
No. 648.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF THE UNITED STATES.

STATEMENT.

This case is before the court on certiorari granted at the present term.

Petitioners were convicted under an indictment charging them with conspiracy to commit an offense against the United States—"to wit, to unlawfully, knowingly, and feloniously introduce and attempt to introduce malt, spirituous, vinous, and other intoxicating liquors into the *Indian country*, which was formerly the Indian Territory and now is included in a portion of the State of Oklahoma, *and* into the city of Tulsa, Tulsa County, Oklahoma, which was formerly within and is now a part of what is known as the Indian country, *and into other parts* and

portions *of that part of Oklahoma which lies within the Indian country.*" (R. 5.) The company was sentenced to pay a fine of one thousand dollars and the costs of the prosecution. Filler was sentenced to imprisonment for one year and a day. (R. 17 and 18.) The Circuit Court of Appeals for the Eighth Circuit, upon writ of error prosecuted by petitioners, affirmed the judgment of conviction (213 Fed. 926; R. 33 *et seq.*), holding, in substance, that the indictment was valid under the act of March 1, 1895, 28 Stat. 693, 697, as well as under section 2139 R. S., as amended July 23, 1892, 27 Stat. 260, and January 30, 1897, 29 Stat. 506; also that a corporation could be indicted for conspiracy to commit a felony.

Concretely stated petitioners contend (1) that the indictment can not be construed as charging a conspiracy to violate the act of 1895, because the language employed by the pleader is that contained in the act of 1892 and 1897, and further that it is not charged that the introduction of liquor was to be from without the State, the contention in this respect being that the act of 1895 is no longer applicable to intrastate shipments of liquor into old Indian Territory; (2) that the indictment can not be construed as charging a conspiracy to violate the acts of 1892 and 1897, because the court should have taken judicial notice of the fact that Tulsa, one of the places to which petitioners conspired to ship liquor, was not "Indian country"; that had such judicial notice been taken, the remainder of the

indictment would have been bad for uncertainty; (3) that the indictment is bad for duplicity, if, as held by the Circuit Court of Appeals, it charges a conspiracy to violate more than one act; and (4) that a corporation can not be lawfully indicted for conspiracy to commit a felony.

ARGUMENT.

I.

The indictment fairly construed must, at this stage, there being a judgment of conviction, be held to properly charge a conspiracy to violate the act of 1895.

The contention that the indictment cannot be construed as charging a conspiracy to violate the act of 1895 rests mainly upon the assertion that there is no specific allegation, aside from the overt acts, that the liquor was to be introduced from *without* the State. The Circuit Court of Appeals dealt with the indictment upon the assumption that it did not contain the specified allegation, and held that the act of 1895 prohibited intra as well as inter state shipments of liquor into old Indian Territory.

While recognizing that its conclusion seemed to be somewhat variant from that announced in *Ex parte Webb*, 225 U. S. 663, and *United States* v. *Bob Wright*, 229 U. S. 226, the Circuit Court of Appeals nevertheless believed itself justified in entering upon an independent examination of the question because, in its judgment, the statements of this court in those cases as to the effect of the enabling act upon the act of 1895 were made upon the concession of the Govern-

ment that the latter act was no longer operative in Oklahoma so far as purely intrastate shipments of liquor were concerned.

The Government does not deem it necessary to argue the question in this case, because it seems clear that the judgment of conviction below can be supported upon the ground, among others, that the indictment, properly construed, actually charges a conspiracy to bring about an introduction of liquor from *without* the State. The attention of this court, however, is invited to the reasoning of the Circuit Court of Appeals upon the point. The question is not free from difficulty, and the Government reserves the right to further argue it in any future cases brought to this court which seem to directly involve the point.

Petitioners' insistence that the overt acts cannot be looked to as a part of the description of the offense, apparently disregards the fact that under section 37 of the Criminal Code of the United States the offense there defined is not merely the unlawful agreement, but such agreement plus an overt act. This is definitely settled in *Hyde* v. *United States*, 225 U. S. 347, 359, wherein it was said:

> Indeed it must be said that the cases abound with statements that the conspiracy is the "gist" of the offense, or the "gravamen" of it, and we realize the strength of the argument based upon them. But we think the argument insists too exactly on the ancient law of conspiracy, and does not give effect to the change made in it by Sec. 5440, *supra*.

It is true that the conspiracy, the unlawful combination, has been said to be the crime, and that at common law it was not necessary to aver or prove an overt act; but Sec. 5440 has gone beyond such rigid abstraction and prescribes, as necessary to the offense, not only the unlawful conspiracy, but that one or more of the parties must do an "act to effect" its object, and provides that when such act is done "all the parties to such conspiracy" become liable. Interpreting the provision, it was decided in *Hyde* v. *Shine*, 199 U. S. 62, 76, that an overt act is necessary to complete the offense. And so it was said in *United States* v. *Hirsch*, 100 U. S. 33, recognizing that while the combination of minds in an unlawful purpose was the foundation of the offense, an overt act was necessary to complete it. *It seems like a contradiction to say that a thing is necessary to complete another thing and yet that other thing is complete without it.* It seems like a paradox to say that anything, to quote the Solicitor General, "can be a crime of which no court can take cognizance." *The conspiracy, therefore, cannot alone constitute the offense. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy.* It constitutes the execution or part execution of the conspiracy and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it cognizable then by the judicial tribunals, such tribunals only then acquiring jurisdiction.

It conclusively follows from this ruling that an indictment under section 37 of the Criminal Code is to be examined by its four corners, and that it will be free from successful attack if all the elements of the offense are found in the description of the unlawful agreement and overt acts considered together. Nothing but the application of some highly technical rule, having no rightful place in modern criminal pleading, would permit resort to the description of the overt acts for the purpose of showing the venue, and an offense within the period of limitations (*Hyde* v. *United States*, 225 U. S. 347, 356, 367; and *Brown* v. *Elliott*, *idem* 392, 400, 401), but would deny all reference to such acts for the purpose of showing some other necessary averment.

Applying, therefore, to the indictment in the case at bar the true rule declared by this court, it is found that the overt acts aver shipments of liquors from *without* the State of Oklahoma, which would bring the case within that portion of the act of 1895 surviving under the rule of the Wright case, *supra*.

For convenience we attach as Appendix A hereto, the provisions of the several acts of 1892, 1895, 1897, and 1906, in parallel, as respects the *person*, *place*, *liquors*, and *acts* reached by the respective prohibitions of each.

But even conceding that the indictment does not aver that the liquor was to be shipped from without the State, the record, while not containing any of the evidence taken at the time, justifies the inference that the case was prosecuted and defended upon the

theory that interstate shipments of liquor were involved, for petitioners moved for a new trial upon the ground of newly discovered evidence relating to such interstate shipments (R. 13). In this situation petitioners are now estopped from urging the objection. *Grant Brothers Construction Company* v. *United States*, 232 U. S. 647, 661. In that case the court deemed the omitted averment essential, but said:

> The defendant was in no wise prejudiced by the defect, and to make it a ground for reversing the judgment, notwithstanding the theory upon which the trial proceeded, would be most unreasonable. *San Juan Light Co.* v. *Requena*, 224 U. S. 89, 96; *Campbell* v. *United States*, *Id.* 99, 106.

The omission, if any, did not prejudice petitioners, and should now be treated as a defect in matter of form only, and therefore covered by section 1025 R. S. *New York Central R. R.* v. *United States*, 212 U. S. 481, 497; *Garland* v. *Washington*, 232 U. S. 642, 646, furnishes additional illustration of the manner in which this court is rejecting old rules which permitted objections on a parity with the one here raised, to constitute reversible error.

Petitioner further urges that the indictment is not good under the act of 1895 because its language seems to be that of the act of 1897. They do not contend that all the elements, save that relating to introduction from without the State, treated above, are not set forth, but seem to rely upon the fact that the language employed is not technically that in which

the act of 1895 is framed. This court will not reverse upon that ground. The indictment is one for conspiracy, and as said by this court in *Williamson* v. *United States*, 207 U. S. 425, 447, "certainty, to a common intent, sufficient to identify the offense which the defendant conspired to commit, is all that is requisite in stating the object of the conspiracy." The indictment in the case at bar certainly meets this test.

In the *Pronovost* case, 232 U. S., 487–8–9, the indictment charged introduction of liquor into "the Flathead Indian Reservation, * * * then and there being an Indian country." On the trial defendant "admitted the introduction as charged in the indictment." The court said:

> * * * So far as appears, the offense charged in the indictment, and shown at the trial, was manifestly cognizable in the District Court.

If an indictment charging the *whole* of the reservation, or the *whole* of the Indian Territory, to be "Indian country" is good, an indictment charging *parts* of either, or of Oklahoma, to be "Indian country" should be equally good.

See also *Hall* v. *United States*, 168 U. S. 632, 639; *Bartell* v. *United States*, 227 U. S. 427, 433; *Hendricks* v. *United States*, 223 U. S. 178, 184; *Dunbar* v. *United States*, 156 U. S. 185, 192; and *Schaap* v. *United States*, 210 Fed. 853, 856.

II.

The indictment legally states a conspiracy to violate section 2139 R. S., as amended by the acts of 1892 and 1897.

Petitioners also insist that the indictment does not charge a conspiracy to violate section 2139, R. S., as amended, because Tulsa, one of the places to which they are charged with conspiring to transport liquors, is not, it is contended, within the Indian country; that the trial court should have taken judicial notice of that fact, and this would have rendered the description in the indictment of the other places in the Indian country bad for uncertainty. In addition to this it is claimed that if the indictment is to be construed as charging a conspiracy to violate both the act of 1895 and section 2139, R. S., as amended, pursuant to the ruling of the Circuit Court of Appeals, then it is open to the objection of duplicity.

Taking petitioners at their word, they are estopped to now contend that the indictment does not properly charge a conspiracy to violate section 2139, R. S., as amended, for at page 28 of their petition to this court for a writ of certiorari in this case they said:

> The framer of the indictment drew the conspiracy section in the exact language of the statute, to-wit, Act of January 30, 1897, not the Act of 1895, which makes it an offense for any person to "*introduce or attempt to introduce* * * * intoxicating liquor of any kind whatsoever into the Indian country."

> In order to set apart the Indian country into which it was conspired to introduce the intoxicating liquors so as to set it apart from the vast expense of territory west of the Mississippi River made Indian country by the Act of June 30, 1834, the words "Indian country" in the indictment were limited and qualified and explained by adding the words, and setting them off by commas (,), "which was formerly Indian Territory and is now included in a portion of the State of Oklahoma." That was the general charge made in the indictment as to what was intended by the words "Indian country."
>
> * * * * *
>
> If the English language means anything at all, as counsel interprets it, this indictment charges nothing but a conspiracy to introduce liquor into the Indian Territory in violation of the Act of 1897.

And again at page 4 of their petition it is stated:

> Thereafter a trial in due form was had for violation of Section 37 of the Penal Code *as endorsed on the indictment*, the jury finding the defendants, Joplin Mercantile Company and Joseph Filler, guilty, and * * * Martin F. Witte, not guilty.

The record shows that the indictment was indorsed: "Indictment for violation of section 37, Penal Code, conspiracy to violate section 2139 R. S."

Reversal can not now be supported by a showing that the description of the *places* in the Indian country should have been set forth in the indict-

ment in greater detail. Petitioners should have moved for a bill of particulars if they "desired further specification and identification," but this they did not do, so far as the record shows. Here again the defect, if any, resolves itself into one of form, and for that reason would preclude a reversal. *Rosen* v. *United States*, 161 U. S. 29, 32, 34, and *Hendricks* v. *United States*, 223 U. S. 178, 184.

Furthermore, the contention of petitioners is opposed to the ruling of this court in *Williamson* v. *United States*, 207 U. S. 425, 449, to the effect that an indictment charging a conspiracy to commit an offense need not state all the elements of such offense "with technical precision." That case is closely analogous to the one at bar, in that it charged a conspiracy to suborn a large number of persons, not identified. This court held the averment sufficient, saying:

> * * * It was not essential to the commission of the crime that in the minds of the conspirators the precise persons to be suborned, or the time and place of such suborning, should have been agreed upon, and as the criminality of the conspiracy charged consisted in the unlawful agreement to compass a criminal purpose, the indictment, we think, sufficiently set forth such purpose. The assignments of error which assailed the sufficiency of the indictment are, therefore, without merit.

See also *Thomas* v. *United States*, 156 Fed. 897, 906, and *Ching* v. *United States*, 118 Fed. 538, 540.

So in the case at bar it was not essential to the commission of the crime that petitioners should have agreed upon the precise points in the Indian country to which they would transport the liquors.

This view renders it unnecessary to determine whether Tulsa, one of the terminal points of shipment, is within or without the Indian country, although, as pointed out by the Circuit Court of Appeals, it would seem that such question is one for proof, not judicial notice. *Dick* v. *United States*, 208 U. S. 340, 351; *Schaap* v. *United States*, 210 Fed. 853, 855, 857; *Evans* v. *Victor*, 204 Fed. 361, 365.

III.

Alleged duplicity.

Petitioners also assert that the action of the Circuit Court of Appeals in construing the indictment as charging a conspiracy to violate the act of 1895 and section 2139, R. S., as amended, renders the indictment bad for duplicity. This contention is devoid of merit. The offense is the conspiracy, and the conspiracy would be single, no matter how many repeated violations of law may have been the object thereof. In the Williamson case hereinbefore cited, 207 U. S. 425, the defendants were charged with conspiring to suborn a large number of persons. Each person suborned would have constituted a distinct violation of law, yet this court held the indictment sufficient. In *Heike* v. *United States*, 227 U. S. 131, 139, an examination of the record shows that the indictment

charged a conspiracy "to commit *offenses* against the United States," etc. In that case the point now raised by petitioners was apparently not deemed worthy of notice either by counsel or this court. In *John Gund Brewing Company* v. *United States*, 206 Fed. 386, the question was squarely raised, and decided upon authority by the Circuit Court of Appeals for the Eighth Circuit favorably to the United States.

To the same effect are *State* v. *Sterling*, 34 Ia. 443, 444; *State* v. *Wilson*, 121 N. C. 650, 655; and Bishop's New Criminal Procedure (2d ed.) sec. 226, p. 1369.

IV.

A corporation can be indicted for conspiracy.

It is urged that the corporation, one of the petitioners, could not legally be indicted for conspiracy, and reliance is had solely upon *State* v. *Delmar Jockey Club*, 200 Mo. 34, 48. The doctrine announced in that case was rejected by this court in *New York Central R. R. Co.* v. *United States*, 212 U. S. 481, 493, in which a conviction of the railroad corporation for unlawfully giving rebates was upheld. This court said that "there is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil." To the same effect are *United States* v. *Union Supply Co.*, 215 U. S. 50; *Cohen* v. *United States*, 157 Fed. 651; *United States* v. *MacAndrews and Forbes Co.*, 149 Fed. 823, 835; and *Roukous* v. *United States*, 195 Fed. 353, 355 (certiorari denied by this court, 225 U. S. 710).

V.

CONCLUSION.

It is not the grounds upon which the Circuit Court of Appeals bedded its judgment that can be made the basis of reversal in this court, but only error in the judgment itself. *McClung* v. *Silliman*, 6 Wheat. 598; *Ex parte Crane*, 5 Pet. 190, 204.

It is plain that no substantial rights of petitioners have been prejudiced, and as the indictment states an offense under section 37 of the Criminal Code, the judgment of conviction should be affirmed. *Connors* v. *United States*, 158 U. S. 408, 411; *Williams* v. *United States*, 168 U. S. 382, 389.

WILLIAM WALLACE, JR.,
Assistant Attorney General.

DECEMBER, 1914.

APPENDIX A.

	Act of 1892.	Act of 1895.	Act of 1897.	Act of 1906 (the enabling act).
Person.....	*Every* person.....	Any person.....	Any person.....	Any person.
Place.....	Indian *country*.....	Indian *Territory*.....	Indian *country* (including allotments while title held in trust).	Indian *Territory*, *Osage Reservation*, and *other parts* of *State* which were Indian reservations on January 1, 1906.
Liquors....	Spirits, ale, beer, wine, or intoxicating liquor.	Vinous, malt, or fermented liquor; or any other intoxicating drink, fermented or not.	Malt, spirituous, or vinous liquor, incluidng beer, ale, wine, ardent or intoxicating liquor or essence or extract producing intoxication.	Any intoxicating liquor of any kind, including beer, ale, and wine.
Act.....	Sell, exchange, give, barter to Indians under charge of an agent.	Manufacture, sell, give away, or in any manner or by any means furnish to anyone.	Sell, exchange, give, barter to Indian allottees (while title held in trust) or to Indian wards of Government under charge of agent, etc.	Manufacture, sell, barter, give away, or otherwise furnish.
	Introduce or attempt to introduce into the Indian country.	*Carry*, or have *carried into* Indian Territory.	Introduce, or attempt to introduce into Indian country, including allottees, as above.	*Ship in*, or *convey*, from *other parts* of State.
				Advertise for sale, or solicit the purchase of.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

JOPLIN MERCANTILE COMPANY AND JOSEPH FULLER, petitioners, v. THE UNITED STATES. No. 648.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and moves the court to advance this cause for hearing on a day convenient to the court during the present term.

Petitioners were convicted in the District Court for the Eastern District of Oklahoma under an indictment charging them and others with conspiracy to commit an offense against the United States, to wit, introducing and attempting to introduce intoxicating liquors into the Indian country.

The indictment, after charging the conspiracy, sets forth the various acts committed by the petitioners in pursuance of such conspiracy, which acts

comprised the delivery on different dates to the American Express Company at Joplin, Missouri, of several shipments of intoxicating liquors consigned to various consignees in Tulsa, Oklahoma, within the Indian country.

The company was sentenced to pay a fine of one thousand dollars and the costs of the prosecution, and Fuller was sentenced to imprisonment for one year and a day.

Upon writ of error the Circuit Court of Appeals affirmed the judgment of conviction (213 Fed. 926), holding, in substance, that the indictment was good as charging a conspiracy to introduce intoxicating liquors into the Indian country in violation of both the act of March 1, 1895, which prohibits the introduction of intoxicating liquors into the Indian Territory (now a part of the State of Oklahoma), and section 2139, R. S., as amended July 23, 1892; and January 30, 1897, which prohibits the introduction of intoxicating liquors into the Indian country.

Application for certiorari was made to this court and the writ granted.

The questions involved are of vital importance in future prosecutions for the shipment of intoxicating liquors into the Indian country and for this reason an early review by this court is desirable.

Opposing counsel concur in this motion.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1914.

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JOPLIN MERCANTILE COMPANY *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 648. Argued January 11, 1915.—Decided February 23, 1915.

A mere conspiracy without overt acts done to effect its object is not indictable under § 37, Judicial Code, and where the averment respecting the formation of the conspiracy refers to no other clause of the indictment for certainty, it must be interpreted as it stands, and in the absence of a distinct averment that the conspiracy was formed to introduce liquors into Indian country within Oklahoma from without the State, the indictment must be construed as relating only to intrastate transactions; it cannot be construed as including interstate transactions because of other averments as to the overt acts of some of the conspirators.

Where concurrent State and Federal control, although not necessarily exclusive of each other, would be productive of serious inconvenience

and confusion, this court may be, as in construing the act of March 1, 1895, and the Oklahoma Enabling Act, constrained to hold that the active exercise of Federal authority in suppressing the introduction of liquor into Indian country under the former was intended to be suspended pending the exertion of state authority on the same subject as prescribed by the Enabling Act.

Pending the continuance of state prohibition as prescribed by the Oklahoma Enabling Act, the provisions of the Act of March 1, 1895, c. 145, 28 Stat. 693, respecting intrastate transactions in regard to introducing intoxicating liquors into that part of the State which was the Indian Territory are unenforceable, although the statute has not been expressly repealed.

The Oklahoma Enabling Act did not repeal the acts of 1892 and 1897, prohibiting the introduction of liquor into Indian country within Oklahoma either as to interstate or intrastate shipments, *Ex parte Webb*, 225 U. S. 663, and *United States* v. *Wright*, 229 U. S. 226, and in this case the indictment sufficiently charges a conspiracy to commit an offense against those acts.

213 Fed. Rep. 926, affirmed.

THE facts, which involve the construction and application of the Federal statutes relating to the introduction of liquor into Indian country within the State of Oklahoma, are stated in the opinion.

Mr. Paul A. Ewert, with whom *Mr. C. H. Montgomery* was on the brief, for petitioners.

Mr. Assistant Attorney General Wallace for the United States.

By leave of court, *Mr. E. G. McAdams*, *Mr. Norman R. Haskell*, *Mr. C. B. Stuart*, *Mr. A. C. Cruce* and *Mr. M. K. Cruce* filed a brief as *amici curiæ:*

Unless construed as relinquishing Federal control of intrastate commerce in intoxicating liquors between other parts of Oklahoma and the former Indian Territory, § 3 of the Oklahoma Enabling Act is repugnant to Art. I, § 8, Const. U. S., as an unconstitutional attempt to

authorize concurrent regulation of commerce which must be exclusively regulated either by State or Nation.

If susceptible of a reasonable construction, which will avoid constitutional question, the statute will be so construed.

The statute may be reasonably construed as remitting to the State exclusive control of intrastate transactions.

The State and the Nation cannot regulate the same commerce at the same time, but Congress may relinquish exclusive control to State. It has done so by the Oklahoma Enabling Act, as to intrastate commerce in liquors.

The act of March 1, 1895, having been superseded as to intrastate transactions by the Enabling Act, Const. U. S., Art. I, § 9, forbids its continuance in force as to interstate transactions.

This contention is not foreclosed by *Ex parte Webb*, 225 U. S. 663.

The act of March 1, 1895, is entitled to be called a regulation of Congress.

Art. 1, § 9 of the Constitution forbids the giving of a preference by any regulation of commerce to one State over another; it applies to commerce on land as well as by sea.

Treated as a regulation of commerce with Indian tribes, the statute gives a preference to Oklahoma, by permitting that State to regulate for itself the commerce in intoxicating liquors between its people and the former Indian Territory, while denying to the people of other States the right to engage in such commerce, under pain of Federal prosecution.

Treated as a regulation of interstate commerce, the act discriminates against Oklahoma by forbidding interstate commerce with a large part of Oklahoma, while not forbidding the introduction of liquor into any other State.

In support of these contentions see, *Bank of Alexandria* v. *Dyer*, 14 Peters, 141; *Bowman* v. *Chicago &c. Ry.*, 125

U. S. 465; *Boyd* v. *Alabama*, 94 U. S. 645; *Ex parte Cain*, 20 Oklahoma, 125; *The Cherokee Tobacco*, 11 Wall. 616; *C., R. I. & P. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426; *Cohens* v. *Virginia*, 6 Wheat. 264; *Re Debs*, 158 U. S. 564; *Dooley* v. *United States*, 183 U. S. 168; *Gibbons* v. *Ogden*, 9 Wheat. 1, 189; *Grafton* v. *United States*, 206 U. S. 333; *Re Heff*, 197 U. S. 488; *L. S. & M. S. Ry.* v. *Ohio*, 173 U. S. 285; *Leisy* v. *Hardin*, 136 U. S. 100; *Murray's Lessee* v. *Baker*, 3 Wheat. 541; *N. Y. C. & H. R. R.* v. *Freeholders*, 227 U. S. 248; *Pennsylvania* v. *Wheeling Bridge*, 18 How. 421; *Pensacola Telegraph Co.* v. *West. Un. Tele. Co.*, 96 U. S. 1; *Perrin* v. *United States*, 232 U. S. 478; Prentice & Egan on Commerce Clause; *Shelby* v. *Guy*, 11 Wheat. 361; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Thomas* v. *Gay*, 169 U. S. 264; *Tiger* v. *Western Invest. Co.*, 221 U. S. 286; *United States* v. *43 Gallons Whiskey*, 93 U. S. 188; *United States* v. *Holliday*, 3 Wall. 407; *United States* v. *Wright*, 229 U. S. 226; *United States* v. *Del. & Hud. Co.*, 213 U. S. 366; *Ward* v. *Race Horse*, 163 U. S. 504; *Ex parte Webb*, 225 U. S. 663; *Whitney* v. *Robertson*, 124 U. S. 190; *Worcester* v. *Georgia*, 6 Peters, 515.

Mr. Justice Pitney delivered the opinion of the court.

In the District Court of the United States for the Southwestern Division of the Western District of Missouri the petitioners, Joplin Mercantile Company and Joseph Filler, with others, were indicted, under § 37 of the Criminal Code (Act of March 4, 1909, c. 321, 35 Stat. 1088, 1096), formerly § 5440, Rev. Stat.; the charge being that at Joplin, Missouri, within the jurisdiction of the court, the defendants did unlawfully, feloniously, etc., "conspire together to commit an offense against the United States of America, to wit, to unlawfully, knowingly, and feloniously introduce and attempt to introduce malt, spirituous,

vinous, and other intoxicating liquors into the Indian country which was formerly the Indian Territory and now is included in a portion of the State of Oklahoma, and into the City of Tulsa, Tulsa County, Oklahoma, which was formerly within and is now a part of what is known as the Indian country, and into other parts and portions of that part of Oklahoma which lies within the Indian country." Overt acts are alleged, each of which consisted in delivering to an express company in Joplin certain packages of intoxicating liquors to be transported thence to Tulsa, Oklahoma, alleged to be within the Indian country. A demurrer and a motion to quash having been overruled, petitioners pleaded to the indictment, were tried and found guilty. A motion in arrest of judgment having been denied, they sued out a writ of error from the Circuit Court of Appeals, where the only question raised was whether the indictment charged an offense against the laws of the United States; neither the evidence nor the charge of the trial court being brought up. The judgment of the District Court was affirmed (213 Fed. Rep. 926), and the present writ of certiorari was applied for, principally upon the ground that the decision of the Court of Appeals was to some extent in conflict with the views expressed by this court in *Ex parte Webb*, 225 U. S. 663, and *United States* v. *Wright*, 229 U. S. 226.

That clause of the indictment which sets forth the conspiracy does not in terms allege, as a part of it, that the liquor was to be brought from without the State of Oklahoma; nor does this clause refer, for light upon its meaning, to the clauses that set forth the overt acts. Hence, we do not think the latter clauses can be resorted to in aid of the averments of the former. It is true, as held in *Hyde* v. *Shine*, 199 U. S. 62, 76; and *Hyde* v. *United States*, 225 U. S. 347, 359; that a mere conspiracy, without overt act done to effect its object, is not punishable criminally under § 37 of the Criminal Code. But the averment

of the making of the unlawful agreement relates to the acts of all the accused, while overt acts may be done by one or more less than the entire number, and although essential to the completion of the crime, are still, in a sense, something apart from the mere conspiracy, being "an act to effect the object of the conspiracy." For this reason, among others, it seems to us that where, as here, the averment respecting the formation of the conspiracy refers to no other clause for certainty as to its meaning, it should be interpreted as it stands. *United States* v. *Britton*, 108 U. S. 199, 205. We therefore think the Court of Appeals properly treated this indictment as not charging that the liquors were to be introduced from another State, and correctly assumed in favor of the accused (supposing the law makes a distinction), that the design attributed to them looked only to intrastate commerce in intoxicants. The suggestion of the Government that the omission of a distinct averment that the conspiracy was to introduce the liquors from without the State did not prejudice petitioners, and should be regarded after verdict as a defect in form, to be ignored under § 1025, Rev. Stat., cannot be accepted, since we have before us only the strict record, and therefore cannot say that the trial proceeded upon a different theory from that indicated by the indictment, or that its averments were supplemented by the proofs.

The offense against the laws of the United States that was the object of the conspiracy must have had reference to one or the other of two distinct prohibitions. The one is that arising from the Act of July 23, 1892, c. 234, 27 Stat. 260, amending § 2139, Rev. Stat., and amended in its turn by the Act of January 30, 1897, c. 109, 29 Stat. 506. The other is § 8 of the Act of March 1, 1895, c. 145, 28 Stat. 693. These are set forth in chronological order in 225 U. S. 671. The distinction now pertinent is that, under the act of 1897: "Any person who shall introduce

or attempt to introduce any malt, spirituous, or vinous liquor . . . or any ardent or intoxicating liquor of any kind whatsoever *into the Indian country, which term shall include any Indian allotment* while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished," etc.; while the Act of 1895 declares: "That any person, . . . who shall, in said [Indian] Territory, manufacture . . . any vinous, malt, or fermented liquors, or any other intoxicating drinks . . . or who shall carry, or in any manner have carried, *into said Territory* any such liquors or drinks . . . shall, upon conviction thereof, be punished," etc. The former has to do with the introduction of liquor into the "Indian country"; the latter relates not to the Indian country as such, but to the Indian Territory as a whole, irrespective of whether it, or any particular part of it, remained "Indian country."

In *Ex parte Webb*, *supra*, we dealt with the effect of the Oklahoma Enabling Act, and the admission of the State thereunder, upon the prohibitions contained in the act of 1895, and held that this act remained in force so far as it prohibited the carrying of liquor from without the new State into that part of it which was formerly the Indian Territory. In *United States* v. *Wright*, *supra*, we held that the prohibition against the introduction of intoxicating liquors into the Indian country found in the act of 1897 was not repealed with respect to intrastate transactions by the Enabling Act and the admission of the State. In the present case, the Court of Appeals held that transportation of intoxicating liquors from the westerly portion of Oklahoma to that part which was formerly Indian Territory was prohibited not only by the act of 1897 but by the act of 1895; holding that this act remained unrepealed as to intrastate commerce in intoxicating liquors, notwithstanding the intimations of

this court to the contrary in the *Webb* and *Wright Cases*. In behalf of the Government it is now insisted that the indictment is clearly sustainable under the act of 1897, and that it is therefore unnecessary to pass upon the question raised about the Act of 1895. But, in view of its importance, and the confusion that would probably result if the matter were left in uncertainty, we deemed it proper to allow the writ of certiorari, and now deem it proper to pass upon the merits of the question with respect to both Acts.

The Court of Appeals correctly considered that the question whether the act of 1895 remains in force respecting intrastate transactions was not concluded by our decision in either the *Webb* or the *Wright Cases*. The declaration upon the subject in 225 U. S. at p. 681 was based upon a concession by the Government, and was stated in unqualified form in order to emphasize that the concession was fully accepted for the purposes of the decision. In the *Wright Case* (229 U. S. at p. 236) we saw no reason to recall it, and so stated; but here again the point was not involved in the question to be decided. It was accepted *arguendo*, rather as an obstacle in the way of reaching the conclusion that the court did reach, upon grounds that held good, as we thought, notwithstanding the point conceded. As was well said by Mr. Chief Justice Marshall, in one of his great opinions, *Cohens* v. *Virginia*, 6 Wheat. 264, 399: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." And if this be true with respect to mere *dicta*, it is no less true of concessions made for the purpose of narrowing the range of discussion, or of testing, by assumed obstacles, the validity of the reasoning by which

the court reaches its conclusions upon the point submitted for decision.

The Court of Appeals declared that the effect of holding that the Enabling Act and the admission of the State repealed the law of 1895 as to importations from parts of Oklahoma not in Indian Territory, would be that importations would remain prohibited from the north, south, and east of the Territory, while those from the west would be turned over to the State; and that the provision of the Enabling Act requiring the constitution of the new State to provide a scheme of liquor prohibition is of no validity if Oklahoma sees fit to repeal the prohibition, as it is said she is at liberty to do, being equal in power with the original States and entitled to set aside all restrictions placed upon her that are not obligatory under the Constitution. Citing *Coyle* v. *Oklahoma*, 221 U. S. 559. As indicating that the act was passed in part as an exertion of the power of guardianship over the Indians, and in part under the power to regulate commerce with them, the court pointed to the pledges of the Federal Government, contained in repeated treaties, to protect the Indians of the Civilized Tribes against the evils of intercourse with people of the white race, especially with respect to the sale of intoxicating liquors; emphasizing the fact that Indian Territory contains the largest body of Indian population in the United States, from which the inference was drawn that Congress could not turn them over to the protection of the local authorities without running counter to the uniform practice of the Federal Government in such matters; that § 1 of the Enabling Act expressly reserves full authority to the National Government for the protection of the Indians and their property, and that protection against the liquor traffic has always been their greatest need; and that numerous statutes, passed about the time Oklahoma was admitted, to protect the Indians against the evils of intoxicating liquor, showed that Con-

gress intended to exercise this protection itself and not to remit it to the State. The conclusion was reached that the liquor prohibition imposed upon the State by § 3 of the Enabling Act (quoted at large 225 U. S. 677) was intended to secure the coöperation of the state authorities, and not to remit to the State the whole subject of the guardianship of the Indians so far as approach to them from the west was concerned. That since, even after admission of the State, there was nothing to prevent Congress from prohibiting importation of liquors into the Indian Territory, peopled, as it was, so largely by Indians, there was no reason to believe that the admission of the State was intended to repeal the 1895 law with respect to the western boundary of the Indian Territory; that under the circumstances of that Territory the acts of 1892 and 1897 were inefficient for the protection of the Indians in this regard, while with the act of 1895 alone in force, prohibiting the carrying of liquor within the Indian Territory, it would not be unlawful to transport liquor from a point within that Territory to an allotment therein; hence the necessity of maintaining in force at the same time the provisions of the acts of 1892 and 1897 prohibiting the introduction of liquor into the Indian country.

The argument has much weight. This court, when deciding the *Webb* and *Wright Cases*, fully appreciated the force of the considerations referred to, as will be manifest, we think, by reference to the opinions, especially that delivered in the former case. But it seems to us that the views expressed by the court below in the present case merely question the reasonableness of implying a repeal of the act of 1895, and hardly attribute full force to the very clear language of the Enabling Act. Upon the question of reasonableness, the fact that importations of liquor into the Territory from the north, east, and south should remain subject to the interdict of the Federal law, while importations from the west (unless originating

without the State) were remitted to state control, is not an anomalous result but one rather characteristic of the inter-action of our Federal and state governments.

We pass on to state, in outline, the grounds upon which the judgment is assailed by counsel for petitioners, and in a separate argument by friends of the court. It is insisted that the provision of the Enabling Act requiring the State to forbid, under penalties, the introduction of intoxicating liquors from other parts of the State into the former Indian Territory can be upheld only by construing it as repealing the provisions of the act of 1895 so far as they deal with such intrastate transactions, because otherwise the Enabling Act would be repugnant to the Commerce Clause of the Constitution of the United States as an attempt to authorize concurrent regulation by state and Federal authority of commerce with the Indians, which it is said, must be exclusively regulated either by State or by Nation; that the Enabling Act may be reasonably construed as relinquishing to the State the exclusive control over commerce in intoxicating liquors between other parts of the State and the former Indian Territory, but not as a regulation of commerce with Indians, because, it is insisted, under the Constitution, Congress cannot delegate to a State the power to regulate commerce with the Indians, any more than the power to regulate interstate commerce, and hence the prohibition clause of the Enabling Act is to be sustained as a surrender to the State of jurisdiction over its own citizens, thereby declared by Congress to be no longer members of Indian tribes so far as commerce in intoxicating liquors is concerned; the Enabling Act being thus treated as in effect a determination by Congress that the tribal relations and guardianship of the Indians should cease, at least as to traffic in liquor between them and the citizens of other portions of the State, leaving the State to regulate this by means of the legislation that the Enabling Act re-

quired it to enact on the subject. It is next argued that, the act of 1895 having been superseded as to intrastate transactions by the Enabling Act, it is beyond the power of Congress to continue it in force as to interstate transactions, and this for two reasons, both based upon the provision of § 9 of Article I of the Constitution that "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another": (a) that the prohibition cannot be maintained as an exercise of the power to regulate interstate commerce, because in that aspect it *discriminates against* the State of Oklahoma by forbidding transportation of liquor into that State from without, while permitting the unrestricted transportation of liquor into the other States; and (b) that it cannot be sustained as an exercise of the power of Congress to regulate commerce with the Indian tribes because it gives a *preference to* the State of Oklahoma by permitting that State to regulate for itself the commerce in intoxicating liquors between the people of other parts of the State and the former Indian Territory, while denying to the people of all the other States the right to engage in such commerce with the same Territory. The result sought to be deduced is that, by reason of the passage of the Enabling Act and the admission of the State thereunder, the act of 1895 cannot be sustained at all. It is said this does not impute to Congress the purpose to pass an act in excess of its powers under the Constitution; that the act when passed was justified not only as a regulation of commerce with the Indian tribes but as an exercise of jurisdiction over territory then within the exclusive jurisdiction of the United States; and that it is now unconstitutional as to interstate transactions, not because of the want of power in Congress to originally pass it, but because of the changed conditions growing out of the admission of the State under an Enabling Act inconsistent with the continuance in force of the act of

1895. And it is said that this question is not foreclosed by the decision in the *Webb Case* sustaining the act as to interstate transactions, because—and this is true—the question under § 9 of Article I of the Constitution was not then raised. Citing *Boyd* v. *Alabama*, 94 U. S. 645, 648.

The reasoning, like the opposed reasoning of the court below, has force; but we think it has also elements of weakness. Thus,—to mention only one or two of these—it is not easy to see how any practical preference is given to the State of Oklahoma in the way of permitting commerce in intoxicating liquors to be conducted between other portions of the State and the former Indian Territory while denied to the people of other States, when the very clause of the Enabling Act that operates, if any does, to destroy the former universality of the act of 1895 does not permit but prohibits commerce in liquors between the one part of the State and the other; the only difference here important being that as to internal commerce the State enforces the prohibition, while as to interstate commerce it is enforced by the United States. Nor is the suggestion convincing that the act of 1895 (if repealed as to intrastate commerce only) remains as a discriminatory regulation of commerce between the States unfavorable to Oklahoma; for in this aspect it forbids not the introduction of liquors from other States into Oklahoma, but only their introduction into that particular part of it which, because of the larger population of Indians that it contains, and because of the previous treaties and the other circumstances pointed out in the *Webb Case*, Congress deemed to be properly entitled to that protection. Moreover, supposing that unconstitutional preferences must be deemed to arise from a partial repeal of the act of 1895 by the prohibitory provision of the Enabling Act, it would, we think, be more logical to avoid the constitutional difficulties by giving less force to that provision of the Enabling Act than by giving to it a force quite beyond

the expressed purpose of Congress. The result would be, if the argument of petitioners as to the impossibility of concurrent regulation of intrastate transactions in liquors with the former Indian Territory by State and Nation is sound, that the state prohibition of the liquor traffic in the Territory and between the other parts of the State and the Territory would have to remain in abeyance until Congress should expressly repeal the act of 1895.

Enough has been said to show the principal grounds of the respective contentions. And it is curious to observe that on each side the argument rests largely upon the supposition that the implied repeal of the act of 1895, if deduced from the inconsistent provisions of the Enabling Act upon the same subject, operated in effect to legalize commerce in intoxicating liquors between the eastern and the western portions of the State. But since the principal inconsistency is that in one case the prohibition of the traffic is to be enforced by the United States and in the other case by the State, many of the difficulties disappear as soon as clearly stated. We need not further analyze the constitutional argument submitted in behalf of petitioners, and must not be understood as committed respecting it.

Conceding that the question with which we have to deal is by no means easy of solution, we think a right solution may be had by considering the terms of the Enabling Act in the light of the situation that was presented to Congress, and in view of its constitutional powers. The situation of the Indians and the Indian lands at the time is so familiar that it need not be here rehearsed. In addition to what has been said upon the subject in our recent decisions, reference may be made to the Committee Report that accompanied the bill in the House of Representatives (H. R. Report No. 496, January 23, 1906, 59th Cong., 1st Sess., Vol. 1). There was a large population of Indians in the Indian Territory, but a much larger

population of whites. Under the provisions of the Curtis Act (June 28, 1898, c. 517, 30 Stat. 495), towns had been organized and were growing rapidly, and much of the land had been allotted. Congress no doubt had in mind the existing agreements with the Five Civilized Tribes, some of them recently made, by which, in one form or another, the United States had agreed to maintain laws against the introduction, sale, etc., of liquors within the territory of the tribes (225 U. S. 684-686). In the first section of the Enabling Act (June 16, 1906, c. 3335, 34 Stat. 267) a reservation was made of the authority of the United States "to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed." The authority of Congress to preserve in force existing laws or enact new ones after statehood with reference to traffic or intercourse with the Indians, including the liquor traffic, was well established; the power of Congress over such commerce being plenary, and independent of state boundaries. *United States* v. *Holliday*, 3 Wall. 407, 418; *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188, 195, 197; *S. C.*, 108 U. S. 491; *United States* v. *Kagama*, 118 U. S. 375, 383; *Dick* v. *United States*, 208 U. S. 340, 353; *Hallowell* v. *United States*, 221 U. S. 317, 323; *Ex parte Webb*, 225 U. S. 663, 683; *United States* v. *Wright*, 229 U. S. 226, 237; *Perrin* v. *United States*, 232 U. S. 478, 483; *Johnson* v. *Gearlds*, 234 U. S. 422, 438.

Still, the Territory was to be erected into a State, and the Indians themselves were to have the rights of citizens. As we have already held in the *Wright Case*, *supra*, it was the purpose to maintain in full force the acts of 1892 and 1897 the same in this State as in other States where Indian country or Indian allotments held in trust by the Government or Indians as wards of the Government were

found. And while we intimate no question that Congress could have maintained the more sweeping internal prohibition of the 1895 act, this would have interfered to a greater extent with the control of the new State over its internal police.

Reading the Enabling Act as a whole in the light of this situation, including the declaration in its first section of the continued authority of the Government of the United States respecting the Indians, the specific requirement in the third section that the state constitution should contain a stringent prohibition of the manufacture, sale, etc., of intoxicating liquors within the Indian Territory and the Reservations for a period of twenty-one years from the date of admission, and thereafter until amendment of the constitution, and the express provision that any person who should manufacture, etc., or should ship or convey such liquors from other parts of the State into the Indian Territory or Reservations should be punished both by fine and imprisonment, we think the inference is irresistible that it was the purpose of Congress that the people of the State should be entrusted with actual power and control over the liquor traffic between the other portions of the State and the Territory and Reservations, and that, for the time at least, they should have the same control that is enjoyed by other States, it being, of course, subject to the effect of the acts of 1892 and 1897.

Without deciding that such control must necessarily be exclusive of co-existing Federal jurisdiction over the same subject-matter, it seems to us that concurrent jurisdiction would be productive of such serious inconvenience and confusion, that, in the absence of an express declaration of a purpose to preserve it, we are constrained to hold that the active exercise of the Federal authority was intended to be at least suspended pending the exertion by the State of its authority in the manner prescribed by the Enabling Act.

Still, the act of 1895 was not expressly repealed; and it must have been in contemplation that the State might amend its constitution and laws upon the subject, at least upon the expiration of twenty-one years; and we do not intend to hold, nor even to intimate, that the effect and operation of the act of 1895 upon intrastate commerce in liquors would still remain in abeyance after a repeal or material modification of the state prohibition upon the subject. The subject-matter of this legislation is quite different from that which was under consideration in *Coyle* v. *Oklahoma*, 221 U. S. 559; and it does not follow from what was there decided that the plan of intrastate prohibition proposed to the State by Congress in the Enabling Act and accepted by the State, would be subject to repeal by the State within the prescribed period. Nor does it follow from anything we have said that Congress may not, during that period, by reënacting in substance the act of 1895, or by appropriate affirmative legislation in some other form, resume the Federal control over the liquor traffic in and with what was Indian Territory, by virtue of its general authority over Indian relations. These and kindred questions may be dealt with if and when occasion arises.

Our opinion upon this branch of the case is that, pending the continuance of state prohibition as prescribed by the Enabling Act, the provisions of the act of 1895 respecting intrastate transactions are not enforceable.

But, as already held in *United States* v. *Wright*, *supra*, the Acts of 1892 and 1897 have not been repealed by the Enabling Act with respect to intrastate commerce in intoxicants, any more than with respect to commerce that crosses state lines. And it remains to be considered whether the indictment sufficiently sets forth a conspiracy to commit an offense against these acts. This turns upon the destination of the liquors as intended by the conspirators. It is averred that three several destinations

were in contemplation: (a) the Indian country which was formerly the Indian Territory and now is included in a portion of the State of Oklahoma; (b) the city of Tulsa, Tulsa County, Oklahoma, which was formerly within and is now a part of what is known as the Indian country; and (c) other parts and portions of that part of Oklahoma which lies within the Indian country. It is said by petitioners that Tulsa was established as a town under the Curtis Act of June 28, 1898, and the Creek Agreement (act of March 1, 1901, c. 676, 31 Stat. 861), and that we ought to take judicial notice of what is said to appear upon the records of the Department of the Interior, that on February 21, 1901, the exterior limits of the town were approved and the tract thus reserved from allotment and set aside for town site purposes, that unrestricted patents have since been issued, and that at the time of the alleged offense Tulsa was a city of 30,000 people. For the sake of simplicity we assume the facts to be so, without deciding that we may take judicial notice of them. But we think the third clause, "other parts and portions of that part of Oklahoma which lies within the Indian country," is sufficient to sustain the indictment in this respect. It is objected by petitioners that this is vague and indefinite, and does not apprise the defendants with certainty of the offense with which they stand charged so as to enable them to prepare the defense; that there were more than 100,000 allotments made to Indians of the Five Civilized Tribes alone, and that the courts should take judicial notice of the fact that the restrictions upon three-fourths of the allotments of mixed bloods have been removed by direct legislation of Congress, not to speak of the lands taken out of Indian country by being included within established town sites. But upon this record we are bound to assume that the indictment sets forth the agreement as it was made by the convicted defendants. That agreement looked to the introduction of intoxicating

liquors into those portions of the State that lie within the Indian country. Presumably the defendants did not, at the time of conspiring, specify the particular points in the Indian country to which the liquor should be shipped; nevertheless, the conspiracy could not be carried out as made without violating the act of 1897.

The indictment is therefore sufficient, and the judgment should be affirmed.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.